

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

1 UNITED STATES OF AMERICA,) AU:10-CR-00297(1)-LY
2)
3 Plaintiff,)
4)
5 VS.) AUSTIN, TEXAS
6)
7 DAVID ANDREW DIEHL,)
8)
9 Defendant.) OCTOBER 24, 2011

10 *****
11 TRANSCRIPT OF SENTENCING HEARING
12 BEFORE THE HONORABLE LEE YEAKEL
13 *****

14 APPEARANCES:

15 FOR THE PLAINTIFF: MATTHEW B. DEVLIN
16 ASSISTANT UNITED STATES ATTORNEY
17 816 CONGRESS AVENUE, SUITE 1000
18 AUSTIN, TEXAS 78701
19
20 FOR THE DEFENDANT: E.G. MORRIS
21 LAW OFFICE OF E.G. MORRIS
22 608 WEST 12TH STREET, SUITE B
23 AUSTIN, TEXAS 78701
24
25 COURT REPORTER: ARLINDA RODRIGUEZ, CSR
200 WEST 8TH STREET
AUSTIN, TEXAS 78701
(512) 916-5143

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24 Proceedings recorded by computerized stenography, transcript
25 produced by computer.

09:01:51 1 (Open Court)

09:01:51 2 THE CLERK: The Court calls for sentencing

09:01:53 3 A-10-CR-297(1), *United States of America v. David Andrew Diehl*

09:01:59 4 MR. DEVLIN: Matthew Devlin for the United States,

09:02:01 5 Your Honor. Good morning.

09:02:02 6 MR. MORRIS: Gerry Morris for the defendant. Good

09:02:04 7 morning.

09:02:04 8 THE COURT: All right. Will the defendant and

09:02:05 9 counsel please come forward.

09:02:19 10 Mr. Diehl, and would you please state your correct

09:02:28 11 name.

09:02:28 12 THE DEFENDANT: David Andrew Diehl.

09:02:30 13 THE COURT: Mr. Diehl, you were tried in this Court

09:02:33 14 without a jury on February the 8th, 2011. Do you remember that

09:02:37 15 trial?

09:02:37 16 THE DEFENDANT: Yes, Your Honor.

09:02:38 17 THE COURT: And you were found guilty by the Court as

09:02:41 18 to sexual exploitation of a child and production of child

09:02:46 19 pornography, class B felonies, ten counts. Do you recall

09:02:51 20 that?

09:02:51 21 THE DEFENDANT: Yes, Your Honor.

09:02:52 22 THE COURT: And you were found guilty of those

09:02:55 23 charges pursuant to a second superseding indictment that was

09:03:01 24 returned by a grand jury impaneled in this case for that

09:03:06 25 purpose. We are here this morning for the purpose of a

09:03:10 1 sentencing hearing. Have you had sufficient time to review
09:03:15 2 with your attorney the presentence investigation report
09:03:18 3 prepared by the Probation Department in this case?

09:03:22 4 THE DEFENDANT: Yes, Your Honor.

09:03:22 5 THE COURT: Are you aware that under the guidelines
09:03:25 6 established by the United States Sentencing Commission, which
09:03:28 7 are advisory to this Court, that the Probation Department has
09:03:32 8 computed your total offense level as 40 and your total criminal
09:03:38 9 history category as II, meaning that if this Court were to
09:03:42 10 determine that a guideline sentence was an appropriate sentence
09:03:44 11 to impose in this case, I could sentence you to 405 months
09:03:50 12 confinement in the Bureau of Prisons, a term of supervised
09:03:54 13 release of five years for each count of conviction, a fine of
09:04:01 14 \$250,000 and a special assessment of \$100 for each count of
09:04:07 15 conviction, for a total special assessment of \$1,000?

09:04:10 16 THE DEFENDANT: Yes, Your Honor.

09:04:12 17 THE COURT: Are you also aware that under the statute
09:04:14 18 under which you have been convicted, I must sentence you to
09:04:19 19 ten years confinement in the Bureau of Prisons, and could
09:04:24 20 sentence you to 20 years confinement in the Bureau of Prisons
09:04:28 21 and I could sentence you to that range of the 20-10 and 20
09:04:33 22 years on each of the ten counts of conviction, which means
09:04:38 23 there would be a total -- potential total sentence of 200 years
09:04:44 24 imprisonment in this case? I could sentence you then to a term
09:04:48 25 of supervised release of five years per count of conviction, a

09:04:53 1 fine of \$250,000 for each count of conviction, and a special
09:04:58 2 assessment of \$100 for each count of conviction, again for a
09:05:04 3 total special assessment of \$1,000. Are you aware of that?

09:05:08 4 THE DEFENDANT: Yes, Your Honor.

09:05:09 5 THE COURT: Does the Government have objection to the
09:05:11 6 presentence investigation report?

09:05:12 7 MR. DEVLIN: No objections, Your Honor.

09:05:14 8 THE COURT: Does the defendant have objection to the
09:05:16 9 presentence investigation report?

09:05:17 10 MR. MORRIS: Yes, we do, Your Honor.

09:05:19 11 THE COURT: All right. Mr. Morris, I will hear from
09:05:21 12 you on your objections at this time.

09:05:26 13 MR. MORRIS: Your Honor, Mr. Diehl would also like to
09:05:29 14 reserve the right to speak to the objections if he deems it
09:05:34 15 necessary after I've finished.

09:05:35 16 THE COURT: Well, let me hear what you have to say.

09:05:37 17 MR. MORRIS: Certainly. To go down them in order,
09:05:41 18 Your Honor, the order that we have them listed in the
09:05:43 19 objections that Mr. Orr filed, the first objection we have is
09:05:50 20 the objection to enhancement for vulnerable victim. That
09:05:53 21 relates to paragraph 82, 90, 98, 105 and 113. Basically, those
09:05:59 22 enhancements have been added to the counts involving Jane Doe
09:06:06 23 Number 3.

09:06:07 24 The rationale for adding the enhancement is that,
09:06:13 25 because she was small in stature, that she must have been more

09:06:18 1 vulnerable, must have experienced pain to a greater extent than
09:06:23 2 another victim. That was added under U.S. Sentencing Guideline
09:06:30 3 Section 381.1 of the 2000 version of the guidelines. And that
09:06:36 4 cross-references in the application notes -- or, actually, the
09:06:42 5 application notes make it very clear that that is not to be
09:06:45 6 applied -- that enhancement is not to be applied if it's
09:06:51 7 incorporated in the offense guidelines.

09:06:55 8 For example, the offense guideline provides an
09:06:57 9 enhancement for the age of the victim. This subsection would
09:07:01 10 not be applied unless the victim was unusually vulnerable for
09:07:06 11 reasons unrelated to age.

09:07:09 12 The particular guideline that we're working with
09:07:11 13 here, 2G2.1 provides for a specific offense characteristic to
09:07:18 14 be applied, a four-level increase, if the victim is under 12.
09:07:22 15 That was applied in all paragraphs that I referenced.

09:07:25 16 The language of the guideline application is real
09:07:30 17 straightforward: If what makes the victim more vulnerable is
09:07:34 18 related to age and is not for a reason unrelated to age, this
09:07:39 19 should not be applied.

09:07:40 20 Now two points. One is that one of the
09:07:48 21 justifications the probation officer puts forward for this
09:07:50 22 enhance is the small size as Jane Doe 3. That's directly
09:07:55 23 related to age. She's small because she is young. And with
09:07:59 24 respect to the second justification, she must experience more
09:08:03 25 pain than the victim of the child -- if the Court remembers

09:08:08 1 seeing those videos involving Jane Doe 3, there was nothing
09:08:12 2 about those videos that indicated she experienced pain.

09:08:15 3 Certainly they were reprehensible. A lot went on.
09:08:20 4 But pain was not a component of it. And this simply is very
09:08:23 5 straightforward from the guideline application notes, that this
09:08:26 6 enhancement should not apply. In my sentencing memorandum,
09:08:30 7 page 4, I've cited cases that are illustrative of when this
09:08:36 8 properly should be applied.

09:08:37 9 And the Court -- *U.S. v. Kapordelis*, the victim was
09:08:43 10 sleeping when she was videotaped. *United States v. Newsom*, the
09:08:46 11 victim was sleeping when -- again, when defendant videotaped
09:08:51 12 her. *United States v. Gawthrop*, the perpetrator was the
09:08:55 13 victim's grandfather and had a particularly close relationship
09:08:57 14 with her. As I recall, he -- she actually lived with her
09:09:01 15 grandfather, and it was more of a father-daughter
09:09:03 16 relationship. That was held to make her more vulnerable. Then
09:09:09 17 *United States v. Bentley*, the victim had been diagnosed with
09:09:11 18 ADHD and oppositional defiant disorder, had mood swings, heard
09:09:17 19 nonexistent voices and basically was delusional, had attempted
09:09:20 20 suicide. In that case the Court held the vulnerable victim
09:09:24 21 enhancement was proper.

09:09:25 22 In summary, the specific offense characteristic in
09:09:30 23 2G2.1 specifically addresses the concerns that the probation
09:09:35 24 officer utilized to apply the vulnerable victim statute --
09:09:39 25 enhancement. And that's just contrary to tenet of the

09:09:41 1 guidelines and the rest of the commentary.

09:09:44 2 THE COURT: Mr. Devlin, what is your preference?

09:09:47 3 Would you prefer to answer these one at a time, or would you

09:09:52 4 prefer that I hear Mr. Morris through on his objections and

09:09:57 5 then you respond to all of them? And, Mr. Morris, what would

09:10:00 6 be your preference on the way we handle these?

09:10:02 7 MR. MORRIS: I think it would be useful to handle

09:10:05 8 them one at a time, Your Honor.

09:10:07 9 THE COURT: Mr. Devlin, is that acceptable to you?

09:10:10 10 MR. DEVLIN: I guess so. The thing is we're going to

09:10:11 11 be having a little bit of just brief testimony on several of

09:10:14 12 the objections all from the same agent. I don't know if it

09:10:16 13 would be more efficient to just have that all done at once or

09:10:20 14 we can piecemeal it. However the Court wishes to proceed.

09:10:23 15 THE COURT: Well, I hate to be calling the agent up

09:10:26 16 and down all the time, so why don't we proceed through them.

09:10:31 17 Mr. Morris, make your objections, and then I'll let Mr. Devlin

09:10:34 18 present what he's going to present. And then if we need to go

09:10:38 19 back and go back through them one at a time for the rulings

09:10:41 20 after I've heard what evidence he intends to present. So go

09:10:47 21 ahead.

09:10:48 22 MR. MORRIS: I understand. Our second scoring

09:10:50 23 objection relates to an enhancement for victims being

09:10:53 24 physically restrained. That's paragraphs 83, 91, and 106.

09:10:58 25 And, again, this relates to Jane Doe 3. The enhancement would

09:11:08 1 be pursuant to Sentencing Guideline 381.3. And the
09:11:15 2 Probation Department increases those based on descriptions of
09:11:19 3 the videos that are included in the presentence report. I'll
09:11:22 4 briefly go through those.

09:11:24 5 Count six, video depicts Diehl restrained Jane Doe 3
09:11:29 6 by holding her down and pinning her between himself and the
09:11:31 7 bed. Jane Doe 3 attempts to get up, but Diehl pushes her back
09:11:35 8 down. I'll stop and address that. That simply overstates
09:11:38 9 what's on the video. The Court has seen the video. And,
09:11:42 10 again, as reprehensible as they are, it's important that we --
09:11:46 11 be accurate with this.

09:11:47 12 What happens in that frame is Mr. Diehl basically
09:11:53 13 briefly puts his hand on Jane Doe 3's head and holds her down
09:11:58 14 briefly, more in the nature of repositioning her than
09:12:03 15 restraining her.

09:12:03 16 Count 7, Diehl then grabs Jane Doe 3 from behind,
09:12:07 17 holds her in place, while he rubs his erect penis between her
09:12:11 18 buttocks. Again, it overstates what happened in that video.
09:12:14 19 He puts his hands on the her backside and repositions her.

09:12:20 20 And count 9 depicts Diehl grabbing Jane Doe by the
09:12:25 21 back of the head, and Diehl then grabs Jane Doe 3 and moves her
09:12:30 22 closer. Again, that overstates the severity of what went on.

09:12:33 23 The application note cross-references 1B1.1 for the
09:12:40 24 definition of "physically restrained." I think the application
09:12:43 25 note is certainly illustrative of what was intended. Physical

09:12:48 1 restrained -- physically restrained means the forcible
09:12:51 2 restraint of a victim such as being tied, bound, or locked up.

09:12:58 3 Now, the case law is very clear that this so not
09:13:00 4 intended to be an inclusive list of all that would constitute
09:13:04 5 "physically restrained." But if you look at the nature of the
09:13:08 6 actions that are cited, tied, bound, or locked up, it's very
09:13:13 7 clear that what's intended here is some forcible restraint,
09:13:17 8 something that significantly impedes a person's ability to move
09:13:23 9 or to get away.

09:13:25 10 And the illustrative cases that I've cited that
09:13:33 11 indicate when it's proper to use this particular enhancement:

09:13:38 12 *United States v. Aguilar*: It's on page 6 of the
09:13:41 13 memorandum. Victim told he could not leave the trailer and was
09:13:44 14 held down and forcibly tattooed.

09:13:47 15 *United States v. Angeles-Mendoza*: Smuggled aliens,
09:13:52 16 kept in building with door locked and windows boarded and a
09:13:57 17 guard patrolling the premises. That may have come out of this
09:14:00 18 Court, as I recall.

09:14:01 19 *United States v. Checora*: Victim tackled by a
09:14:04 20 defendant and dragged to a location where his throat was cut.

09:14:08 21 *United States v. Clayton*: The victim was handcuffed
09:14:11 22 and kicked by the defendant. That was a case involving a civil
09:14:15 23 rights violation where a police officer had handcuffs on
09:14:18 24 someone and then proceeded to kick them.

09:14:23 25 *Arcoren v. United States*: Defendant grabbed two

09:14:26 1 victims sexual assaulted repeatedly, preventing them from
09:14:29 2 leaving the room.

09:14:30 3 And *Kime*: Victim held down while defendant attempted
09:14:34 4 to cut off his finger with wire cutters.

09:14:36 5 And *Roberts*: The robbery victim was held around the
09:14:39 6 neck at knife point.

09:14:40 7 I've not been able to find a case where the type of
09:14:44 8 conduct that is described in the presentence investigation
09:14:48 9 report and, more importantly, the type of conduct that's
09:14:51 10 actually on the videos was held -- was offered to support this
09:14:55 11 type of enhancement. There's not an appellate case one way or
09:14:59 12 the other that says what happened here is -- is the type of
09:15:03 13 restraint addressed by that guideline. I suspect why is
09:15:07 14 because it's never been offered as justification. The
09:15:10 15 guidelines simply anticipates simply much more significant than
09:15:14 16 what we have here.

09:15:19 17 The next --

09:15:22 18 THE COURT: Hold on just a minute.

09:15:24 19 MR. MORRIS: Sure.

09:17:07 20 THE COURT: All right. You may proceed.

09:17:08 21 MR. MORRIS: The next objection is we object to the
09:17:09 22 two-point enhancement for care, custody, and control. It
09:17:13 23 relates to paragraph 81, 89, 97, 104, and 112. Again, this
09:17:20 24 enhancement relates to the counts of conviction involving
09:17:23 25 Jane Doe 3.

09:17:28 1 The basis of the enhancement is that there was a
09:17:33 2 reference by Mr. Diehl's wife and by the mother of Jane Doe 3
09:17:38 3 that on one occasion Jane Doe 3 was left with him to babysit.
09:17:44 4 Based on that reference, the Probation Department has enhanced
09:17:52 5 in five counts for care, custody, and control, basically
09:17:57 6 stating that he was babysitting on all five instances. And in
09:18:05 7 response to Mr. Orr's objection to this, the Probation
09:18:07 8 Department responds that, well, it makes more sense that he
09:18:11 9 would have done this while he was babysitting because he would
09:18:15 10 of at that point had the opportunity. And if he wasn't
09:18:18 11 babysitting, he wouldn't have.

09:18:19 12 Well, obviously, there's a logical problem with
09:18:22 13 that. If he was only babysitting once, what about the other
09:18:26 14 five -- or the four, rather, instances? Basically, there is no
09:18:30 15 evidence whatsoever from any source and none cited in the
09:18:35 16 presentence report that would indicate that these videos were
09:18:38 17 made at the time when Mr. Diehl was babysitting. If it's the
09:18:46 18 probation officer's position that he was babysitting once and
09:18:50 19 all five of these occurred while he was babysitting, then it
09:18:54 20 ought to be one count.

09:18:56 21 The standard is that the proponent of the enhancement
09:19:03 22 as showed by a preponderance of the evidence that it applies.
09:19:07 23 There is simply no evidence that these videos were made at a
09:19:09 24 time when Mr. Diehl had -- was babysitting Jane Doe 3 or in any
09:19:15 25 other respect.

09:19:16 1 THE COURT: Well, if we take away the babysitting
09:19:21 2 situation, Jane Doe Number 3 was a small child, she was with
09:19:27 3 Mr. Diehl. How did she get there, if she wasn't in his care,
09:19:32 4 custody, and control?

09:19:34 5 MR. MORRIS: She --

09:19:35 6 THE COURT: Forget about whether he was babysitting
09:19:37 7 or not. Small children are generally just not out roaming
09:19:44 8 around, and I don't think that was the situation here when I
09:19:47 9 look back on the evidence at the trial. So ignoring for the
09:19:52 10 moment that -- whether he was babysitting or not, it seems to
09:19:59 11 me that there is a circumstantial case that she was in his
09:20:03 12 care, custody, and control at the time of the offense.

09:20:06 13 MR. MORRIS: There is certainly the alternative
09:20:09 14 possibility that she was there in someone else's care, custody,
09:20:12 15 and control and that she was with him only briefly during the
09:20:15 16 time that these were made. And that just highlights the
09:20:19 17 problem. There is no evidence one way or the other how she
09:20:24 18 ended up in his presence at the time these videos were made.

09:20:28 19 There's evidence, I believe, from the statements of
09:20:32 20 the mother, Mr. Diehl's wife, that -- that the mother and child
09:20:37 21 frequently were at the Diehl home. And certainly it's possible
09:20:42 22 these videos were made at a time when the child was at the
09:20:45 23 Diehl home, but not in any sort of custodial arrangement with
09:20:52 24 him.

09:21:03 25 If we look at the cases that speak to that

09:21:08 1 enhancement, it's almost always some definable formal
09:21:11 2 arrangement. The child was left with a babysitter or left with
09:21:17 3 a student -- I mean, an educator or something to that nature.
09:21:21 4 And there's just simply a vacuum here. There's not any -- not
09:21:26 5 any indication of what that arrangement was in this situation.

09:21:30 6 THE COURT: All right. Thank you.

09:21:32 7 MR. MORRIS: Okay. Our next objection relates to
09:21:35 8 failure to grant the third point for acceptance of
09:21:40 9 responsibility. That third point is ordinarily reserved for
09:21:44 10 defendant's that don't go to trial. However, in this case
09:21:48 11 Mr. Diehl waived a jury. He stipulated to, by far, the vast
09:21:52 12 majority of the evidence that would have been presented at
09:21:56 13 trial. He prevented the victims portrayed in the videotapes
09:22:02 14 from having to come testify. And, in short, what happened was
09:22:07 15 a bench trial that centered around a very narrow issue relating
09:22:16 16 to interstate commerce nexus and simply, virtually tantamount
09:22:21 17 to a plea of guilty with reserving one factor.

09:22:23 18 And we suggest to the Court that there was a
09:22:25 19 significant amount of work and trial preparation on the part of
09:22:28 20 the Government that was saved by his actions. And, certainly,
09:22:31 21 he gave up valuable rights -- right to trial by jury, right to
09:22:37 22 confront and cross-examine the witnesses, and other trial
09:22:39 23 rights -- by entering into those stipulations and by waiving a
09:22:43 24 jury.

09:22:47 25 Our next objection is we object to the -- basically

09:22:55 1 the way the multi-count adjustment was applied. It's or
09:23:04 2 contention that with respect to each of the three victims, all
09:23:08 3 counts relating to a particular victim being grouped together.
09:23:14 4 And the result would be three groups of counts and then would
09:23:19 5 be -- that the multi-count calculation thus be done on those
09:23:26 6 three groups.

09:23:27 7 Basically, the --

09:23:31 8 THE COURT: And what would -- remind me what your
09:23:33 9 position is on what the result of that would be if you prevail
09:23:36 10 on that objection?

09:23:38 11 MR. MORRIS: We've stated the calculation I think in
09:23:41 12 the sentencing memorandum. But there was a five-level
09:23:47 13 adjustment for basically multiple groups.

09:23:50 14 THE COURT: And what paragraph is that found in?

09:23:52 15 MR. MORRIS: Let's see.

09:23:53 16 THE COURT: I've read it. But as you might gather, I
09:23:57 17 have a large amount of paperwork in front of me as I'm sitting
09:24:01 18 here going through this. So I need you to direct me to it.

09:24:03 19 MR. MORRIS: It begins on page 9 of the sentencing
09:24:06 20 memorandum.

09:24:07 21 THE COURT: All right. And this is the most recent
09:24:10 22 sentencing memorandum -- your sentencing memorandum or previous
09:24:14 23 counsel's sentencing memorandum?

09:24:15 24 MR. MORRIS: My sentencing memorandum.

09:24:17 25 THE COURT: All right.

09:24:20 1 MR. MORRIS: And the net effect would be a
09:24:22 2 three-level increase for a total number of units rather than a
09:24:26 3 five-level. So the net effect.

09:24:27 4 THE COURT: So the net effect would be a decrease of
09:24:33 5 two; is that correct?

09:24:34 6 MR. MORRIS: That's correct.

09:24:35 7 THE COURT: Let me get to your sentencing memorandum.

09:24:41 8 MR. MORRIS: The argument begins on page 9, and then
09:24:43 9 the calculations are on page 10.

09:24:51 10 THE COURT: All right. Thank you.

09:24:54 11 MR. MORRIS: And, again, there's the -- the
09:24:57 12 commentary indicates that the counts are not being grouped.

09:25:00 13 Basically, they were wrongs to a particular victim that
09:25:04 14 occurred on separate days, separate distinct wrongs. In this
09:25:09 15 case, there's not any evidence that it did occur or not
09:25:12 16 sufficient evidence that it did occur on separate days to
09:25:15 17 warrant considering each of these accounts separately.

09:25:26 18 The final scoring objection relates to criminal
09:25:29 19 history category. And Mr. Orr's objections, it's -- it's that
09:25:34 20 the defendant's the 1991 case should not count under 4A1.2 of
09:25:39 21 the Federal Sentencing Guidelines.

09:25:40 22 And, basically, the -- the argument is that there are
09:25:45 23 certain types of defenses that are excluded under the
09:25:48 24 guidelines from consideration in a criminal history
09:25:51 25 calculation. One category of defense that's excluded is

09:25:55 1 disorderly conduct. If there was a jail -- unless there was a
09:25:59 2 jail sentence of 30 days or more assessed or more than one year
09:26:03 3 probation.

09:26:04 4 And what we're arguing about here is the menacing
09:26:11 5 conviction reported in paragraph 136. The -- there is no
09:26:17 6 indication that he received more than 30 days jail time -- or
09:26:21 7 at least 30 days that wasn't suspended. The presentence report
09:26:25 8 reflects that that sentence was suspended and doesn't state for
09:26:30 9 what period of time it was suspended. So it doesn't qualify as
09:26:34 10 either a 30-day or a one-year probation.

09:26:37 11 The question is, is menacing substantially the same
09:26:41 12 as disorderly conduct? I've cited -- this is page 11 of the
09:26:45 13 sentencing memorandum of mine. I've cited the code provision
09:26:52 14 of the Ohio Revised Code that defines the offense of menacing
09:26:58 15 as follows:

09:26:59 16 No person shall knowingly cause another to believe
09:27:03 17 that the offender will cause physical harm to the person or
09:27:06 18 property of such other person or members of his immediate
09:27:09 19 family.

09:27:10 20 So just to parse that, it doesn't require that there
09:27:16 21 actually be harm. It doesn't require that it be to a person.
09:27:19 22 It can be to the property -- the apprehension, that is, of harm
09:27:21 23 to a person or property, and it doesn't specify any particular
09:27:26 24 manner and means of occasioning that apprehension.

09:27:32 25 If you look by comparison at "disorderly conduct"

09:27:39 1 under Texas Penal Code 42.01(a), I've set out some of the
09:27:44 2 manners and means disorderly conduct under that statute.

09:27:48 3 Use of abusive, indecent, profane, or vulgar language
09:27:54 4 in a public place, and the language by its very utterance
09:27:58 5 tends to incite in immediate breach of the peace;

09:28:02 6 Makes an offensive gesture or display in a public
09:28:04 7 place, and the gesture tends to incite and immediate breach of
09:28:07 8 the peace;

09:28:08 9 And this number four is the one that's I think
09:28:11 10 particularly analogous: Abuses or threatens a person in a
09:28:16 11 public place in an obviously offensive manner;

09:28:20 12 And then six: Fights with another in a public place;

09:28:23 13 Or eight: Displays a firearm or other deadly weapon
09:28:25 14 in a public place in a matter calculated to alarm.

09:28:30 15 Going back to number four, abuse or threatens a
09:28:33 16 person in a public place in an obviously offensive manner is
09:28:38 17 almost dead on to what we see with "menacing." And it's our
09:28:44 18 contention that menacing, the class four misdemeanor for which
09:28:49 19 Mr. Diehl was convicted in Ohio in 1991, is simply tantamount
09:28:54 20 to that particular version of disorderly conduct in Texas and
09:28:58 21 should not be counted.

09:29:07 22 MR. MORRIS: Your Honor, that's all of the scoring
09:29:08 23 objections.

09:29:09 24 THE COURT: Do you want to address your objection to
09:29:11 25 paragraph 139 that is also included in this part of your

09:29:15 1 objection?

09:29:20 2 MR. MORRIS: I think the objection to 139 was that
09:29:24 3 there were no court records supplied for that particular
09:29:30 4 objection or for that particular conviction showing a
09:29:33 5 disposition. And I believe that the Probation Department
09:29:41 6 produced some court records and attached it to the addendum.

09:29:44 7 THE COURT: Right.

09:29:45 8 MR. MORRIS: Would the Court like for me to go
09:29:47 9 through the non-scoring objections at this point?

09:29:49 10 THE COURT: Mr. Devlin, do you intend to offer
09:29:52 11 evidence on the non-scoring objections or only on the scoring
09:29:55 12 objections?

09:29:56 13 MR. DEVLIN: Just the scoring objections, Your Honor.

09:29:57 14 THE COURT: All right. Then let's hold on the
09:29:59 15 non-scoring objections at this time. At this time, Mr. Devlin,
09:30:03 16 you may respond to the six scoring objections.

09:30:16 17 MR. DEVLIN: Judge, I intend to present brief
09:30:19 18 testimony really only about two of the objections. That is
09:30:22 19 objection one, the vulnerable victim objection, and objection
09:30:26 20 three, the care, custody, and control issue. It's probably not
09:30:31 21 going to be any more than what was presented at trial. But I
09:30:35 22 just want to make sure that that information is in the record.

09:30:38 23 So what I can do is if I can address the objections
09:30:40 24 that I don't intend to put testimony on, that's just really
09:30:44 25 legal argument first, or I can put the testimony on first.

09:30:47 1 THE COURT: Let's hear the testimony first.

09:30:51 2 MR. DEVLIN: Okay.

09:30:51 3 THE COURT: And then you can go through your
09:30:52 4 responses in order. And then I'll hear back from Mr. Morris.

09:30:56 5 MR. DEVLIN: Okay.

09:30:57 6 THE COURT: I think that will be the best way to
09:30:59 7 proceed.

09:31:00 8 MR. DEVLIN: Very good. Then I will go ahead and
09:31:03 9 call Special Agent Sean Mullen.

09:31:05 10 (Witness sworn)

09:31:05 11 **SEAN MULLEN,**

09:31:05 12 having been first duly sworn, testified as follows:

09:31:05 13 **DIRECT EXAMINATION**

09:31:05 14 **BY MR. DEVLIN:**

09:31:27 15 Q. Would you please state your name for the record and spell
09:31:30 16 your last name.

09:31:30 17 A. Sean Mullen, M-u-l-l-e-n.

09:31:31 18 Q. And how are you employed?

09:31:32 19 A. I'm a special agent with the Federal Bureau of
09:31:34 20 Investigation.

09:31:35 21 Q. And you're currently -- you're assigned to Austin, but
09:31:38 22 you're on temporary duty in Baltimore; is that correct?

09:31:41 23 A. Just outside of Washington, yes.

09:31:42 24 Q. Okay. And what is your position now?

09:31:44 25 A. I'm a supervisor special agent at the Innocent Images

09:31:49 1 National Initiative Unit and Cyber Division at FBI

09:31:51 2 Headquarters.

09:31:51 3 Q. And just briefly, what does that involve?

09:31:53 4 A. The Innocent Images National Initiative Unit is the

09:31:55 5 program management for the child pornography cases,

09:31:59 6 exploitation of children that the FBI runs. And as that, I'm a

09:32:01 7 program manager which has responsibility for 11 field offices.

09:32:05 8 THE COURT: Would you restate that division. Your

09:32:07 9 words kind ran together. I'm not sure I got it right.

09:32:11 10 THE WITNESS: Okay. Innocent Images National

09:32:12 11 Initiative Unit.

09:32:14 12 THE COURT: Okay. Thank you.

09:32:15 13 THE WITNESS: You're welcome.

09:32:16 14 Q. (BY MR. DEVLIN) And Innocent Images is the name of the

09:32:19 15 program, I guess, that the FBI calls it's anti-child

09:32:22 16 exploitation efforts in general; is that correct?

09:32:25 17 A. Yes, it is.

09:32:26 18 Q. Okay. You were the case agent, obviously, on this case;

09:32:29 19 is that right?

09:32:29 20 A. Yes, I was.

09:32:30 21 Q. And you had the opportunity to interview many of the

09:32:35 22 individuals, many of the victims, the victims' families

09:32:39 23 involved in this case; is that correct?

09:32:40 24 A. Yes, sir.

09:32:41 25 Q. And one of those was Jane Doe Number 3 and her family; is

09:32:45 1 that right?

09:32:46 2 A. Yes, sir.

09:32:46 3 Q. All right. What generally was -- let me start out by

09:32:54 4 this: What -- approximately how old was Jane Doe Number 3 at

09:32:59 5 the time that the videos that were introduced into evidence

09:33:02 6 were filmed? How old was she at the time?

09:33:04 7 A. She was approximately three years old at the time.

09:33:06 8 Q. Okay. How would you describe the nature of her and her

09:33:13 9 family's relationship with the defendant at that time?

09:33:17 10 A. They were friends.

09:33:19 11 Q. All right.

09:33:19 12 A. Friendship.

09:33:20 13 Q. All right. They lived in the vicinity?

09:33:22 14 A. Yes. They lived just a few miles away, if I remember

09:33:29 15 correctly.

09:33:29 16 Q. And is it also fair to say that Jane Doe Number 3's mother

09:33:33 17 was friends with Kerry Jenkins, who at the time was married to

09:33:37 18 the defendant?

09:33:38 19 A. Yes, she was.

09:33:39 20 Q. All right. You interviewed Jane Doe Number 3's mother?

09:33:43 21 A. Yes, sir.

09:33:44 22 Q. As well as Kerry Jenkins?

09:33:44 23 A. Yes, sir.

09:33:45 24 Q. All right. Did you address with them the issue of under

09:33:49 25 what circumstances Jane Doe Number 3 was left with the

09:33:52 1 defendant in which he could have videotaped their -- his sexual
09:33:59 2 abuse of her?

09:33:59 3 A. Yes, we did.

09:34:00 4 Q. What -- what did they tell you?

09:34:02 5 A. Jane Doe Number 3's mother advised that she recalled that
09:34:07 6 at least on one occasion, that she had went shopping with
09:34:10 7 Ms. Jenkins and had left her daughter in the custody and care
09:34:14 8 of Mr. Diehl. But she could not exclude that there were more
09:34:20 9 occasions. She said there were probably or possibly more
09:34:23 10 occasions. I think "possibly" was the word she used.

09:34:26 11 Q. How about Kerry Jenkins? Did she address that?

09:34:27 12 A. Ms. Jenkins recalled one account when they went shopping
09:34:31 13 at the Gap, but she didn't make any other statements regarding
09:34:35 14 any other further occasions.

09:34:36 15 Q. Now, as part of your interview process with
09:34:38 16 Jane Doe Number 3's mother, was there any -- was she shown any
09:34:41 17 of the videos themselves?

09:34:42 18 A. The videos, no. She was shown still images from the
09:34:47 19 videos.

09:34:47 20 Q. Why wasn't she shown the videos.

09:34:48 21 A. In order to protect her, not to be traumatized by those
09:34:52 22 videos and what was depicted in them.

09:34:53 23 Q. It was sufficient? Really what you were looking for was
09:34:56 24 the identification of Jane Doe Number 3 in those videos, and
09:35:00 25 that could be accomplished with still photos?

09:35:03 1 A. Yes, sir.

09:35:04 2 Q. So was there much of a concern at the time in determining
09:35:07 3 exactly how many times she left Jane Doe Number 3 with the
09:35:10 4 defendant?

09:35:10 5 A. No. Not at the time.

09:35:14 6 Q. Okay. And as a three-year-old, was there -- in your
09:35:30 7 review of the videos, was there any -- anything indicating her
09:35:33 8 level of ability to communicate, in other words, in order to
09:35:37 9 speak, that were -- that were depicted in the videos?

09:35:40 10 MR. MORRIS: Object to that, Your Honor. The videos
09:35:43 11 speak for themselves. What his observation is is irrelevant.
09:35:47 12 He has not been qualified as an expert to offer an opinion as
09:35:50 13 to her level of communication or the things that he was asked
09:35:55 14 about.

09:35:56 15 THE COURT: Mr. Devlin?

09:35:57 16 MR. DEVLIN: I'm just asking what was in the videos.
09:35:59 17 I'm not asking for expert opinion.

09:36:01 18 THE COURT: Well, the Court has reviewed the videos.
09:36:03 19 I'm aware of what it looked like. So I'm going to sustain the
09:36:08 20 objection.

09:36:08 21 Q. (BY MR. DEVLIN) Okay. Was there any indication in your
09:36:12 22 interviews with either Jane Doe Number 3's mother or Kerry
09:36:16 23 Jenkins that they were present when any of these videos that
09:36:19 24 were introduced into evidence were made?

09:36:20 25 A. No, sir.

09:36:21 1 Q. They were not present?

09:36:22 2 A. They were not present.

09:36:24 3 Q. All right. And based on your investigation, was there any
09:36:27 4 other adult present during the making of any of those videos
09:36:31 5 involving Jane Doe Number 3?

09:36:34 6 A. No, sir, there were not.

09:36:35 7 Q. Was there anybody who Jane Doe Number 3 at that time could
09:36:39 8 have cried out to for help while those videos were being made?

09:36:42 9 A. No, sir.

09:36:43 10 Q. Okay. Do you know how long Jane Doe Number 3 may have
09:36:46 11 been in -- based on your interviews, may have been in the
09:36:50 12 custody of the defendant while she was left with them while
09:36:55 13 perhaps Ms. Jenkins and Jane Doe Number 3's mother went out?

09:37:00 14 A. No, I do not.

09:37:00 15 Q. Did they indicate what they had been doing when they left
09:37:04 16 her there?

09:37:04 17 A. They went shopping, and Ms. Jenkins recalled that they
09:37:07 18 were shopping at the Gap.

09:37:09 19 Q. All right. How far away did -- let me put it this way:
09:37:16 20 How -- were they next-door neighbors?

09:37:18 21 A. No, they were not.

09:37:19 22 Q. They lived -- Jane Doe Number 3 and her family lived a
09:37:23 23 little bit of distance from Mr. Diehl's house?

09:37:25 24 A. That's correct, yes.

09:37:26 25 Q. Okay. So it wasn't as if she could walk out of the house

09:37:29 1 and walk next door?

09:37:30 2 A. No, sir.

09:37:30 3 Q. Was there any other adult present in her home -- Jane Doe
09:37:36 4 Number 3's home at the time, to your knowledge?

09:37:39 5 A. I believe her father was still living with her at the
09:37:43 6 time, yes.

09:37:43 7 Q. Okay. Would he have been working or not at home at the
09:37:46 8 time? Do you know?

09:37:47 9 A. I do not know.

09:37:48 10 Q. That was not addressed at any of your interviews?

09:37:51 11 A. No.

09:37:51 12 Q. But he was clearly not -- he was not present when these
09:37:54 13 videos were being made.

09:37:56 14 A. As far as I know, no, he was not.

09:37:58 15 Q. All right. So there's no indication that

09:38:03 16 Jane Doe Number 3 had been kidnapped to be present in

09:38:06 17 Mr. Diehl's house for the making of these videos; is that
09:38:09 18 right?

09:38:09 19 A. That's right. There's no information.

09:38:11 20 Q. Was there any information that she was found wandering in
09:38:14 21 the street by Mr. Diehl and ever reported to the police as
09:38:18 22 being a lost child?

09:38:19 23 A. No.

09:38:19 24 Q. Okay. Any other situation in which she might have been in
09:38:27 25 that house?

09:38:28 1 A. No.

09:38:28 2 Q. Other than being left there consciously by her mother

09:38:32 3 while she and Ms. Jenkins went out?

09:38:34 4 A. No.

09:38:35 5 Q. So it would be fair to say that was a trusted friendship

09:38:38 6 there?

09:38:38 7 A. Yes.

09:38:38 8 Q. Okay. Nothing unusual about leaving her three-year-old in

09:38:43 9 the custody of the husband of somebody she knew?

09:38:45 10 A. No, there wasn't.

09:38:47 11 Q. All right. And was there any indication that

09:38:56 12 Jane Doe Number 3 ever stayed over at Mr. Diehl's house?

09:39:01 13 A. Not that I recall, no.

09:39:02 14 Q. All right. Didn't stay overnight or for any length of

09:39:06 15 time beyond that which she was left in his custody by her

09:39:10 16 mother?

09:39:10 17 A. Not that I recall, no.

09:39:13 18 MR. DEVLIN: Okay. I pass the witness.

09:39:16 19 THE COURT: Mr. Morris?

09:39:17 20 **CROSS-EXAMINATION**

09:39:17 21 **BY MR. MORRIS:**

09:39:17 22 Q. It's true, isn't it, that there's total of about 11

09:39:24 23 minutes of video involving Jane Doe 3?

09:39:27 24 A. I don't recall the exact amount of time, how many minutes.

09:39:30 25 Q. More than 15?

09:39:31 1 A. I do not recall, really.

09:39:35 2 Q. Very, very brief period of video?

09:39:37 3 A. That's fair. I would say no more than 15 is probably
09:39:40 4 accurate, yes.

09:39:41 5 Q. It's also true that your investigation has not shown the
09:39:44 6 dates -- date or dates on which these videos were made?

09:39:49 7 A. Not exactly, no.

09:39:50 8 Q. Could have been made as late as November of 2000?

09:39:54 9 A. That's what our investigation revealed, yes.

09:39:56 10 Q. At that point Jane Doe 3 would have been four years old,
09:40:00 11 would she have not?

09:40:01 12 A. She would have approached -- yeah. She would have just
09:40:03 13 turned four, if my recollection is correct, yes.

09:40:06 14 Q. Okay. Did -- did you question Jane Doe 3's mother about
09:40:11 15 what sort of things she did when she visited the Diehl home,
09:40:17 16 what sort of activities she engaged in?

09:40:19 17 A. No I did not.

09:40:20 18 Q. Have you talked to her about, for instance, a hot tub in
09:40:26 19 the backyard where maybe she and Ms. Diehl would congregate
09:40:29 20 sometimes?

09:40:30 21 A. Yes. I believe that either her or Ms. Jenkins mentioned
09:40:33 22 that.

09:40:33 23 Q. That the two of them would be in hot tub sometimes?

09:40:37 24 A. I do not recall that it was just the two of them. But I
09:40:40 25 knew they did use the hot tub, yes.

09:40:42 1 Q. Do you recall questioning her about what her daughter
09:40:47 2 would be doing when they would be around the hot tub?

09:40:49 3 A. No, I do not.

09:40:50 4 Q. Do you recall questioning her about how closely she
09:40:54 5 watched her daughter when she was at the Diehl home?

09:40:58 6 A. No, I do not.

09:41:00 7 MR. MORRIS: Pass the witness.

09:41:06 8 THE COURT: Mr. Devlin?

09:41:07 9 **REDIRECT EXAMINATION**

09:41:07 10 **BY MR. DEVLIN:**

09:41:07 11 Q. I guess I'm trying to determine when these happened. What
09:41:11 12 is it that distinguishes each of the videos involving
09:41:14 13 Jane Doe Number 3 that to you indicates they may have been done
09:41:18 14 at different times and dates?

09:41:20 15 A. Well, on each video or some of the videos she has
09:41:22 16 different clothing on. Her nails -- her fingernails have nail
09:41:26 17 polish on them in a few of the videos, and then she has a
09:41:30 18 different colored head band as well. And the videos are shot
09:41:33 19 in different rooms within Mr. Diehl's residence.

09:41:36 20 Q. Was there any indication in any of your interviews that
09:41:40 21 she left clothes at Mr. Diehl's residence?

09:41:41 22 A. No, sir.

09:41:42 23 Q. Or any other accessories or things like that?

09:41:44 24 A. No, sir.

09:41:44 25 Q. And in some you said she's wearing what looks like

09:41:47 1 fingernail polish and another she's not?

09:41:50 2 A. That's correct, yes.

09:41:51 3 Q. Perhaps different necklaces and earrings, you said?

09:41:56 4 A. I believe earrings and a headband.

09:41:58 5 Q. Is there also anything about the lighting in any of the

09:42:02 6 different videos that indicate they were done at different

09:42:05 7 times of day?

09:42:05 8 A. The lighting appears in one of them to be a lot of natural

09:42:09 9 light coming into one room, and the other one appears to be

09:42:11 10 artificially light only with a lot of shadows.

09:42:14 11 MR. DEVLIN: Pass the witness.

09:42:15 12 THE COURT: Mr. Morris, anything further?

09:42:18 13 MR. MORRIS: One brief area.

09:42:20 14 **RECROSS-EXAMINATION**

09:42:20 15 **BY MR. MORRIS:**

09:42:20 16 Q. You talked to Jane Doe 3's mother about her going to the

09:42:27 17 Star Ranch Nudist Camp with the Diehl family?

09:42:30 18 A. Yes, I did.

09:42:31 19 Q. And they spent the night there sometimes, didn't they?

09:42:33 20 A. Yes, they did.

09:42:34 21 Q. And then sometimes they would come back over to the

09:42:35 22 Diehl's home after spending the night at the Star Ranch?

09:42:39 23 A. That's my understanding, yes.

09:42:40 24 MR. MORRIS: Pass the witness.

09:42:44 25 *****

FURTHER DIRECT EXAMINATION

BY MR. DEVLIN:

Q. But just to make -- just to make clear, all the videos involving Jane Doe Number 3 filmed within the Diehl residence; is that correct?

THE COURT: That's correct, yes.

MR. DEVLIN: Pass the witness.

THE COURT: Mr. Morris?

MR. MORRIS: No further questions, Your Honor.

THE COURT: I have a question, Agent Mullen. If I recall your testimony correctly from the trial, there was testimony that you were never able, at least as of that time, to access what Mr. Diehl had stored in his computer that you seized; is that correct? Am I remembering that correctly?

THE WITNESS: Yes, Your Honor. That's correct.

THE COURT: Have you been able to access it between the trial and now?

THE WITNESS: No, sir. The hard drive is still encrypted.

THE COURT: All right. And so you have been unable, through the normal means you use, to break the encryption; is that correct?

THE WITNESS: That is correct, yes.

THE COURT: Did you ever request of Mr. Diehl that he provide you with the encryption information so you could view

09:43:40 1 what was in the hard drive?

09:43:41 2 THE WITNESS: No. I don't believe we did.

09:43:43 3 THE COURT: All right. Thank you.

09:43:44 4 MR. DEVLIN: I have no questions, Your Honor.

09:43:45 5 MR. MORRIS: Nothing further of this witness,
09:43:47 6 Your Honor.

09:43:58 7 MR. DEVLIN: Judge, in terms of the normal victim
09:44:01 8 enhancement, I think that the fact that --

09:44:05 9 THE COURT: Just a minute. Does that conclude the
09:44:07 10 testimony you were going to put on for the purposes of the
09:44:09 11 objections?

09:44:09 12 MR. DEVLIN: Yes, it does, Your Honor.

09:44:10 13 THE COURT: And, Mr. Morris, do you have any
09:44:12 14 testimony or evidence for purposes of the objections?

09:44:15 15 MR. MORRIS: No, Your Honor, I do not.

09:44:16 16 THE COURT: All right. Now, Mr. Devlin.

09:44:18 17 MR. DEVLIN: Thank you, Your Honor.

09:44:19 18 The enhancement for age that is contained in the
09:44:24 19 child pornography guidelines is just simply an enhancement for
09:44:28 20 under 12, prepubescent. It does not distinguish between
09:44:32 21 11 year-olds and three-year-olds or seven-year-olds or
09:44:35 22 one-year-olds or infants.

09:44:37 23 I think it's pretty clear that a three-year-old left
09:44:41 24 in the situation that she was in at Mr. Diehl's house, her
09:44:44 25 mother obviously trusted Mr. Diehl. They had at least a

09:44:49 1 trusted relationship through friendship at the house.

09:44:52 2 THE COURT: Well, let me -- are you dealing with
09:44:54 3 objection one at this point?

09:44:56 4 MR. DEVLIN: I guess I'm kind of dealing with both
09:44:58 5 one and three. They're almost kind of intertwined in a lot of
09:45:01 6 ways. But ...

09:45:02 7 THE COURT: Why don't you try to --

09:45:03 8 MR. DEVLIN: Trying to.

09:45:05 9 THE COURT: -- untwine them, because Mr. Morris
09:45:08 10 presented them separately.

09:45:10 11 MR. DEVLIN: Right.

09:45:11 12 THE COURT: And they do each carry a two-point
09:45:14 13 enhancement. And so I don't want to get them mixed between one
09:45:17 14 another, so I can rule separately on them.

09:45:19 15 MR. DEVLIN: Right. I will address the vulnerable
09:45:22 16 victim first. And as I mentioned, there are four levels added
09:45:25 17 for being under 12. But that doesn't further distinguish
09:45:28 18 between, say, an 11-year-old or a three-year-old or
09:45:31 19 one-year-old or infant or anything else.

09:45:34 20 And I think it's probably fair to say, I think, that
09:45:38 21 the Court can use its own common sense in saying that there's
09:45:42 22 an increased vulnerability in a three-year-old versus a nine-,
09:45:46 23 ten-, or 11-year-old based on just simple cognitive
09:45:49 24 experiential differences. I don't think we need to have a
09:45:51 25 psychiatrist -- a child psychiatrist come in here and tell us

09:45:54 1 that a three-year-old is going to just simply have a different
09:45:57 2 range of understanding and interpretation and ability, perhaps,
09:46:01 3 or even desire to cry out for help than maybe an older child
09:46:07 4 who is under 12.

09:46:09 5 She was left alone with the defendant. She was not a
09:46:13 6 next-door neighbor. She lived some distance away. It wasn't a
09:46:16 7 situation that she could leave. She probably didn't even
09:46:20 8 understand at the time what was going on and that it was
09:46:25 9 horribly wrong and probably did not realize that there was
09:46:30 10 anything to be said, which might be why it was never reported
09:46:34 11 to her mother.

09:46:35 12 So the increased vulnerability there, Judge, is not
09:46:40 13 based on her age, necessarily. While age does play a factor,
09:46:43 14 it's just simply the cognitive and the experiential differences
09:46:47 15 that she had that made her extra vulnerable. But, also, she
09:46:50 16 was left in a situation where her mother said, Hey, I trust
09:46:54 17 these people. I don't mind leaving you here with Mr. Diehl to
09:46:57 18 be cared for until I return. And so I think that that type of
09:47:02 19 situation also gives her some reassurance regardless of age
09:47:07 20 that she's in a safe place when she actually was not.

09:47:10 21 And so just on that basis, Judge, I believe that she
09:47:13 22 was vulnerable for reasons that went beyond just age under the
09:47:19 23 situation. There was no reason for her not to trust Mr. Diehl
09:47:23 24 or not to trust that anything that he was doing was improper.

09:47:26 25 And so that's all I have with vulnerable victim. And

09:47:31 1 I guess I'll leave it at that. Do you want me to move on to
09:47:35 2 the other objections at this point?

09:47:37 3 THE COURT: Well, let me ask a question about that.
09:47:44 4 Mr. Morris's objection is basically that once you have applied
09:47:54 5 the four levels for the victim being under 12, you don't apply
09:48:01 6 the initial two levels for vulnerable victim unless it is not
09:48:07 7 age related. Is that correct, Mr. Morris? Is that basically
09:48:10 8 your objection?

09:48:11 9 MR. MORRIS: That's exactly what the guideline says.

09:48:13 10 THE COURT: And that what they have done here -- what
09:48:15 11 has been done here is to apply that on a purely age related
09:48:21 12 basis.

09:48:21 13 Now, when you read -- usually the guidelines manual
09:48:26 14 is not the clearest worded document. But in reading
09:48:35 15 Application Note 2, Section 3A1.1 -- well, let me start out:
09:48:43 16 3A1.1 applies to hate crime motivation or vulnerable victims.
09:48:51 17 Application Note 2 reads: For purposes of subsection (b) --
09:48:54 18 which is what we're dealing with here, subsection (b)(2) -- or
09:49:01 19 (b)(1). Pardon me -- says: "Vulnerable victim" means a person
09:49:08 20 (A) who is a victim of the offense of conviction and any
09:49:11 21 conduct for which the defendant is accountable. That's
09:49:14 22 satisfied. And (B) who is unusually vulnerable due to age,
09:49:18 23 physical, or mental condition, or who is otherwise particularly
09:49:23 24 susceptible to the criminal conduct.

09:49:26 25 Now, I address this to both of you because it appears

09:49:29 1 that Application Note 2(b) brings age back in as a potential
09:49:41 2 factor in 3A1.1(b)(1). Otherwise, it wouldn't have been
09:49:48 3 mentioned.

09:49:49 4 Mr. Devlin, do you have a comment on that?

09:49:53 5 MR. DEVLIN: Well, I think she was unusually
09:49:56 6 susceptible, Judge, because of the trusting relationship that
09:49:59 7 existed at the time between her mother and Mr. Diehl and
09:50:02 8 Ms. Jenkins. It's different when, you know, even at the age of
09:50:07 9 three, some three-year-olds are able --

09:50:09 10 THE COURT: Well, let me stop you right there. Is it
09:50:12 11 your position that age can be considered a second time or it
09:50:20 12 cannot?

09:50:21 13 MR. DEVLIN: Well, I don't see how you can't consider
09:50:24 14 age. I mean, it's just a part of the human condition that
09:50:26 15 somebody is of a certain age and of a certain cognitive
09:50:29 16 ability.

09:50:29 17 THE COURT: I understand. But Mr. Morris seems quite
09:50:32 18 certain that the law says you consider it when you place the
09:50:36 19 four-level enhancement, but you don't consider it again on the
09:50:39 20 two-level enhancement. And the application note uses the word
09:50:47 21 "age." I'm just asking you to distinguish the law he cites or
09:50:50 22 his position on this, because the burden is on the Government
09:50:54 23 at this stage.

09:50:55 24 MR. DEVLIN: Right. I'm trying to do that, Judge, as
09:50:57 25 best I can within the guidelines which, as you said, are -- are

09:51:01 1 not the most clear words. But at the same time, I think that
09:51:07 2 the fact that she was left -- I guess it really doesn't matter
09:51:11 3 if she was three or five or seven and left in this trusting
09:51:14 4 relationship. She's going to have her guard down a little bit
09:51:18 5 more than she would if she had approached a stranger on the
09:51:22 6 street who might have wanted to do the same things to her.

09:51:25 7 There was, again, a trust built between her family
09:51:27 8 and Mr. Diehl and his family that would cause her to think,
09:51:33 9 regardless of her age, that whatever he asked her to do would
09:51:38 10 be okay, because her mother trusted him; therefore, she is
09:51:41 11 going to trust him. And so I think that is a way to
09:51:45 12 distinguish age.

09:51:46 13 But at the same time, I think that you have to
09:51:48 14 account for the cognitive and experiential aspects of a
09:51:53 15 three-year-old versus that of a seven-year-old. It's not
09:51:57 16 age -- I don't think age is completely taken out of it because
09:52:00 17 you can't do that. But I don't think age is going to be the
09:52:04 18 exclusive reason. We're not asking you do it because she's
09:52:09 19 simply three. We're asking you because, again, of the
09:52:11 20 cognitive differences between her and, say, an older child.

09:52:14 21 I don't think the enhancement was applied with the
09:52:17 22 older children, although I think that they were equally
09:52:20 23 vulnerable in other ways that we won't go into at this point.
09:52:24 24 But at the same time, I don't think age can be ever 100 percent
09:52:28 25 separated from the consideration under the vulnerable victim as

09:52:32 1 long as you're just not simply saying, Well, she's three and,
09:52:36 2 therefore, that involves a much bigger difference.

09:52:39 3 I think because she's three, she has certain
09:52:42 4 cognitive abilities and skills and decision-making tools
09:52:45 5 available to her that are much more limited than, say, an older
09:52:49 6 child has. An older child might recognize that that is wrong.
09:52:53 7 A three-year-old is not going to recognize that what was
09:52:56 8 happening to her was wrong. And so, again, yes, age does come
09:53:00 9 into play. But it's -- it's just a fact of the human
09:53:05 10 condition, that that's the developmental level that she is at.

09:53:10 11 I'm not saying that there is anything, you know,
09:53:13 12 physically or mentally wrong with her at all. She's just
09:53:16 13 three, and three-year-olds just don't know the difference
09:53:19 14 between right and wrong in actions at that age. An eight- or
09:53:25 15 nine-year-old would probably know much better that what
09:53:29 16 happened to Jane Doe Number 3 was a wrong act and might be more
09:53:33 17 likely to report it.

09:53:34 18 And so -- but, again, I'm relying more heavily on the
09:53:37 19 fact that she was susceptible because of the friendship and the
09:53:40 20 trusting relationship between her family and the defendant's
09:53:43 21 family. That made her much more vulnerable than, say, a
09:53:47 22 stranger who was a three-year-old might have been, because a
09:53:51 23 three-year-old might have had enough cognitive ability to not
09:53:56 24 encounter a stranger, whereas the guard was down when her
09:53:59 25 mother left her there alone under the circumstances.

09:54:02 1 Again, not blaming her mother. It just was the
09:54:05 2 situation. She had no one to cry out to. Until her mother
09:54:08 3 came to us, she never did cry out, because we would have known
09:54:11 4 about this a long time ago. So he took advantage of a
09:54:15 5 situation that he knew there was a trusting relationship on.

09:54:18 6 THE COURT: Okay. Well, wait just a minute. I want
09:54:24 7 to hear you through and then I'll come back to Mr. Morris.

09:54:26 8 MR. DEVLIN: I'm sorry. Through all the objections,
09:54:28 9 Judge?

09:54:28 10 THE COURT: Yeah. Now we're at number two.

09:54:30 11 MR. DEVLIN: Okay. The physical restraint, Judge, I
09:54:33 12 think you can -- we're relying exclusively on the video of
09:54:39 13 that. I think you can judge for yourself whether there was
09:54:41 14 physical restraint. There doesn't have to be any length of
09:54:44 15 time on the physical restraint. There was physical restraint
09:54:47 16 imposed on that video that -- that you've seen for yourself.
09:54:50 17 And I think that that is sufficient to warrant the enhancement
09:54:55 18 and overcome that objection. And that's all that I have to say
09:54:58 19 about that objection.

09:55:04 20 THE COURT: Number three?

09:55:05 21 MR. DEVLIN: Number three, again, there will only be
09:55:07 22 a few ways that Jane Doe Number 3 could be in the defendant's
09:55:11 23 custody at the time: She was either kidnapped, found
09:55:15 24 wandering. If she was found wandering and sexually abused
09:55:18 25 before he called the police, that wouldn't be helpful to the

09:55:22 1 defendant. And the only other thing is that she was left there
09:55:25 2 in a trusted relationship. Her mother would not have left her
09:55:28 3 just in the house by herself. She would have ensured that
09:55:31 4 someone of appropriate age was there, and that was the
09:55:33 5 defendant.

09:55:35 6 He was undoubtedly home alone when he filmed his
09:55:38 7 sexual abuse of Jane Doe Number 3 as well as the other
09:55:42 8 victims. He was the adult in charge. I think the
09:55:48 9 circumstantial evidence indicates that he was the only adult
09:55:50 10 there. There was no other adult there that -- it wasn't
09:55:52 11 apparent from the videos. We have no other information that
09:55:55 12 any other adult or caretaker was there.

09:55:58 13 And in terms of the multiple occasions, Judge, you
09:56:00 14 could see for yourself the videos I think do speak for
09:56:04 15 themselves. This was not -- these charges were not a situation
09:56:07 16 where there was one video of her that was cut into multiple
09:56:11 17 segments and charged separately. Each of the charged videos in
09:56:15 18 the indictment attempted to distinguish between other videos
09:56:18 19 based on either location or primarily clothing worn. In this
09:56:27 20 case, fingernail color, necklaces, earrings, and headbands.
09:56:31 21 She's in different clothes in every single occasion. And that
09:56:34 22 would indicate -- and without there being a relationship where
09:56:37 23 she was leaving clothes at the defendant's residence -- and
09:56:40 24 that's the only information that we have, is that that was not
09:56:44 25 being done -- it would indicate that all of these situations

09:56:47 1 occurred at different times.

09:56:49 2 So the interviews that Agent Mullen had with Jane Doe
09:56:53 3 Number 3's mother who simply said, probably more off the cuff,
09:56:57 4 yeah, I left her there at least once. This is years later when
09:57:01 5 these interviews are occurring, and she was not told about, you
09:57:07 6 know, the multiple videos and why that might be an important
09:57:10 7 answer to get more specific on. She was being obviously very
09:57:13 8 honest about it. But at that point it was more of a
09:57:18 9 matter-of-fact remark. But it clearly indicates that there
09:57:21 10 were different occasions that she was left in his custody,
09:57:24 11 because he would not have committed these acts of sexual abuse
09:57:29 12 in the presence of anybody else and anybody in a trusted
09:57:32 13 relationship with Jane Doe Number 3.

09:57:35 14 So it indicates that there were several occasions
09:57:37 15 that she was left in his custody. The only information that we
09:57:43 16 have based on even the videos is that they were the only two in
09:57:47 17 the vicinity. They were done in bedrooms or other -- other
09:57:51 18 places that could be closed off from other portions of the
09:57:55 19 house. But there would certainly not be another adult. He
09:58:00 20 would not find himself alone in a room with Jane Doe Number 3
09:58:04 21 under the circumstance, and I think the Court can use its
09:58:06 22 common sense in determining that.

09:58:08 23 That's all I have on the care and custody issue,
09:58:18 24 Your Honor.

09:58:18 25 THE COURT: All right. Number 4?

09:58:19 1 MR. DEVLIN: Number 4 the language of 3E1.1 does not
09:58:24 2 warrant the awarding of a third point. He probably doesn't
09:58:31 3 deserve the first two, but I will say that his stipulation did
09:58:35 4 prevent having the other victims come in to testify. That was
09:58:40 5 all done pretty late in the process. There was no guilty plea
09:58:44 6 here, as you know. The 3E1.1(b) says that he's got to timely
09:58:51 7 provide complete information to the government concerning his
09:58:54 8 own involvement in the offense or timely notify authorities of
09:58:57 9 his intention to enter a plea of guilty, thereby permitting the
09:59:02 10 government to avoid preparing for trial and permitting the
09:59:04 11 Court to allocate its resources efficiently.

09:59:08 12 He didn't plead guilty. He did stipulate to most of
09:59:12 13 the elements. But one of the more important elements, the
09:59:14 14 interstate commerce nexus was one that we had to prove up with
09:59:18 15 testimony and we did so. And I think that he's -- his position
09:59:22 16 has been that he did not have any -- he did not put these
09:59:26 17 videos on the Internet, which I think is a blatant lie, because
09:59:30 18 there would be no other way it would get on the Internet. It
09:59:33 19 all defies common sense and reasoning to believe that.

09:59:36 20 But I don't think he's deserving of the third point
09:59:39 21 under the circumstances. Given the first two points which he's
09:59:42 22 has been given, but not the third point. He doesn't qualify
09:59:46 23 for it under the guidelines.

09:59:47 24 THE COURT: Special Agent Mullen in response to a
09:59:50 25 question by the Court stated that Mr. Diehl had never been

09:59:54 1 requested to give up the encryption information in order that
10:00:01 2 his hard drive on his computer could be examined. Did anybody
10:00:05 3 to your knowledge for the government, Assistant U.S. Attorney
10:00:09 4 or any other agent, ever request that Mr. Diehl provide the
10:00:15 5 encryption key in order that the hard drive of the computer
10:00:19 6 could be examined.

10:00:21 7 MR. DEVLIN: No. And I believe the reason is he
10:00:23 8 invoked his right to a lawyer.

10:00:29 9 THE COURT: All right. Number 5, the grouping.

10:00:31 10 MR. DEVLIN: In all my years of doing the -- of doing
10:00:35 11 this, Judge, as clear as I am about most of the sentencing
10:00:38 12 guidelines, grouping has always eluded me. And I'm sure it's
10:00:43 13 probably eluded others. But I think one thing is pretty clear
10:00:46 14 from the grouping, and that is: Under 3D1.2, offenses under
10:00:51 15 2G2.1, which is what we're talking about, are specifically
10:00:55 16 excluded from the grouping process. And, therefore, each
10:00:58 17 constitutes a separate harm.

10:01:00 18 Again, I want to go back to the emphasizing that in
10:01:05 19 each of the counts of the indictment, a video was alleged that
10:01:08 20 was separate from the other videos. Again, we did not take one
10:01:12 21 five-minute video, separate it into one-minute segments, and
10:01:18 22 call each of those a different count.

10:01:21 23 We -- the indictment took pains to ensure that there
10:01:24 24 was some reasonable way that the Court and the jury, who we
10:01:28 25 thought we were going to go before, could distinguish between

10:01:31 1 videos without having to indicate a time or date that they were
10:01:36 2 done.

10:01:37 3 They were in different places, different clothing,
10:01:42 4 different acts were done. Perhaps the victim looked a little
10:01:48 5 bit different with longer hair or maybe looked a little bit
10:01:52 6 older or younger in a particular video that would distinguish
10:01:54 7 the timing. All of those indicate that they were separate
10:02:00 8 acts; that they were done at separate times; and each of those
10:02:03 9 acts involved a separate harm. There was a different sexual
10:02:06 10 assault every single time, which would -- which would lead to a
10:02:11 11 separate harm. And so each of the productions does involve a
10:02:16 12 separate harm and a separate victim. And that's why 2G --
10:02:21 13 excuse me -- 3D1.2 excludes the 2G2.1 offenses from its
10:02:27 14 operation.

10:02:28 15 So as complicated as the grouping rules can be,
10:02:30 16 that's a pretty clear statement that emerges that these are not
10:02:34 17 to be grouped at all under those rules.

10:02:37 18 And then, finally, Judge, on the menacing conviction,
10:02:41 19 I simply adhere and concur with Probation's response to that.

10:02:47 20 THE COURT: Thank you. Mr. Morris, you may respond.

10:02:54 21 MR. MORRIS: Your Honor, let me begin by directing
10:03:01 22 your attention to the language in the guideline I'm relying on
10:03:05 23 in the vulnerable victim issue, the application notes of 3A1.1
10:03:11 24 Application Note 2.

10:03:13 25 THE COURT: It's the third paragraph you're relying

10:03:15 1 on?

10:03:16 2 MR. MORRIS: Correct.

10:03:16 3 THE COURT: Is that correct?

10:03:18 4 MR. MORRIS: Let me make sure.

10:03:19 5 THE COURT: Which specifically under your

10:03:24 6 construction, that takes age back out when it says: For

10:03:32 7 example, if the offense guideline provides an enhancement for

10:03:35 8 the age of the victim, this subsection would not be applied

10:03:37 9 unless victim was unusually vulnerable for reasons unrelated to

10:03:42 10 age.

10:03:42 11 MR. MORRIS: Correct.

10:03:43 12 THE COURT: I'm aware that that's where you are.

10:03:46 13 MR. MORRIS: It appears to me that that directive is

10:03:48 14 very clear, unlike a lot of other directives. If it relates to

10:03:53 15 age, you don't apply it. If it's unrelated to age, you do.

10:04:01 16 And all of the factors that have been put forth here by the

10:04:03 17 government relate to age.

10:04:05 18 The enhancement for under 12 has been applied, the

10:04:09 19 four-level enhancement. Certainly the argument can be made and

10:04:13 20 common sense will tell us that an 11-year-old is different than

10:04:17 21 a 12-year-old, 10 different than 11, et cetera, et cetera in

10:04:21 22 terms of development. But it all relates to age. And this is

10:04:25 23 a -- this is very severe guideline. The Sentencing Commission

10:04:29 24 is starting at level 27 on the 2G2.1. And they had something

10:04:36 25 in mind here when they increased four levels for age. And then

10:04:40 1 they further say, don't increase any more if it's just for
10:04:43 2 age. It appears to be very clear that that's the circumstance
10:04:47 3 that would reflect -- with respect to this enhancement.

10:04:50 4 Now, with regard to the further vulnerable victim
10:05:01 5 enhancement --

10:05:03 6 No. I'm sorry. Move on to the restraint. Again,
10:05:17 7 the guideline -- the language of the guideline and the
10:05:20 8 commentary makes it clear by examples that it uses, we're
10:05:25 9 talking about forcible restraint. We're talking about
10:05:27 10 significant impediment of someone's movement by tying them up,
10:05:34 11 binding them, handcuffing them in some of the examples that I
10:05:38 12 get, bound or locked up. And there is simply nothing in those
10:05:44 13 videos that rises to that level.

10:05:47 14 Again, this is a severe guideline we're starting out
10:05:50 15 with. This enhancement was intended to apply to an aggravated
10:05:54 16 situation. And we simply don't have that aggravated factor in
10:05:58 17 this case.

10:05:59 18 With respect to the care and custody issue, we can
10:06:08 19 speculate on what happened. But the standard is: What does
10:06:12 20 the evidence show by a preponderance of the evidence? What the
10:06:17 21 evidence shows is that there is approximately 11 minutes of
10:06:22 22 video, and the Court has seen that, involving Jane Doe 3. That
10:06:26 23 there is one instance that anyone can recall where Jane Doe 3
10:06:33 24 was left with David Diehl to babysit. There are five videos,
10:06:41 25 five counts. Either four of those occurred when he wasn't

10:06:45 1 babysitting, or there was only one video. And there is simply
10:06:51 2 nothing to explain the relationship between him and Jane Doe 3
10:06:56 3 on those other four occasions.

10:07:00 4 We can -- perhaps it was his mother and Mrs. Diehl
10:07:04 5 were out in the hot tub out in the backyard. Perhaps they were
10:07:08 6 somewhere else in the house. Eleven minutes of video, this
10:07:12 7 happened very quickly. We're talking about five -- five videos
10:07:16 8 a total of 11 minutes. It's a little over two minutes a
10:07:20 9 video. It was something that didn't require any sort of
10:07:23 10 long-term custodial relationship. And Mr. Diehl points out to
10:07:29 11 me as I pointed out earlier --

10:07:31 12 THE COURT: Was a long-term custodial relationship
10:07:34 13 required under the guidelines or any custodial relationship?

10:07:37 14 MR. MORRIS: I think long-term is probably a poor
10:07:41 15 choice of words on my part. I don't think it requires a
10:07:45 16 temporal duration.

10:07:47 17 THE COURT: I'm not trying to accuse you of a poor
10:07:50 18 choice of words. Approaching it from the other end, was that a
10:07:52 19 term of art you used? That's what I'm looking at.

10:07:56 20 MR. MORRIS: No, sir, it's not. But there has to be
10:07:58 21 some sort of custodial relationship. The cases again talk
10:08:02 22 about Boy Scout leaders, educators. A babysitter is
10:08:08 23 specifically mentioned in the guidelines. There's always some
10:08:12 24 relationship that the evidence can point to to show what that
10:08:16 25 relationship was. And in this case, there's simply no evidence

10:08:20 1 to show when this videotaping occurred and what that
10:08:24 2 relationship was at that time.

10:08:46 3 With respect to the offense levels and grouping,
10:08:49 4 again, if it --

10:08:50 5 THE COURT: Well, back up. You skipped over four,
10:08:52 6 the third point for acceptance of responsibility. There is no
10:08:59 7 motion by the government here to grant the third level for
10:09:03 8 acceptance of responsibility. That, of course, is mentioned in
10:09:05 9 the guideline. Is it your position that the Court may grant
10:09:15 10 the third point without a motion by the government?

10:09:18 11 MR. MORRIS: Under the 2000 version of the
10:09:20 12 guidelines, that motion was not required, Your Honor. And
10:09:23 13 that's the version of the guidelines that is applicable here.

10:09:27 14 And with respect to whether the encryption was
10:09:34 15 requested of Mr. Diehl -- Mr. Devlin, correct me if I'm wrong
10:09:37 16 on this, because I'm obviously hearing this secondhand -- I
10:09:41 17 believe that Mr. Orr at one point discussed providing that key
10:09:44 18 with the government. And the government's response was, We'll
10:09:47 19 be able to decrypt it without it. Is that accurate?

10:09:51 20 MR. DEVLIN: I don't recall that. And if there was,
10:09:54 21 it wasn't done gratis. That's for sure. It was going to be
10:09:58 22 some price to be exacted in return for that that was probably
10:10:01 23 not acceptable to us under the circumstances, if that was
10:10:05 24 done. I don't recall specifically. It may have been, but it
10:10:07 25 was not going to be done for free.

10:10:10 1 MR. MORRIS: That's the currency we deal with in
10:10:13 2 federal court, is information. And, again, that -- I was not
10:10:17 3 part of that conversation, so I can't represent to the Court
10:10:21 4 that that occurred. But I've been told that it did.

10:10:24 5 And with respect to the third level, yes, the Court
10:10:29 6 can grant that. In the prior version of the guidelines, it was
10:10:32 7 acceptable. And, again, just to briefly state again, it wasn't
10:10:36 8 quite a plea of guilty but almost was. The only issue reserved
10:10:40 9 for the Court was the interstate commerce issue. And the vast
10:10:43 10 majority of the evidence that would have been required at
10:10:46 11 trial, not to mention the jury trial and all that was related
10:10:52 12 to that, was waived.

10:10:56 13 THE COURT: Now you're to grouping.

10:11:00 14 MR. MORRIS: To grouping, if these are distinct harms
10:11:04 15 that occurred on separate days, then the guidelines does
10:11:05 16 exclude 2G2.1 from grouping. If the evidence does not show by
10:11:10 17 a preponderance of the evidence that these were in fact
10:11:15 18 distinct harms occurring on separate days, then it's a
10:11:19 19 continuum harm and they should be grouped. It's our position
10:11:21 20 that the evidence has not shown that.

10:11:24 21 And with respect to the criminal history point, what
10:11:30 22 I set forth in the memorandum, again, just pointing back to
10:11:35 23 paragraph -- the fourth manner and means of committing the
10:11:39 24 offense of disorderly conduct in Texas, abuses or threatens a
10:11:43 25 person in a public place in an obviously offensive manner,

10:11:48 1 that's just tantamount to: No person shall knowingly cause
10:11:53 2 another to believe that the offender will cause physical harm
10:11:56 3 to the person or property.

10:11:58 4 THE COURT: Stress for me again the relationship
10:12:00 5 between those two, between the Texas statute and the Ohio
10:12:04 6 statute. Is it your argument -- I forget what you told me.
10:12:07 7 I'm not looking at the memo again right this minute. The Texas
10:12:11 8 statute has been held to not apply; is that correct?

10:12:16 9 MR. MORRIS: Well, the guideline itself says that
10:12:19 10 disorderly conduct is an offense that does not apply unless
10:12:21 11 there is a 30-day or more jail sentence or more than a year of
10:12:24 12 probation. And what I've done is set out the Texas statute as
10:12:29 13 an example of what disorderly conduct is.

10:12:36 14 THE COURT: Well, go back through that argument
10:12:38 15 again, because I'm not sure that I followed you. And I will
10:12:42 16 tell you when I first looked at this some months ago -- of
10:12:47 17 course, I didn't have the benefit of your sentencing memorandum
10:12:52 18 and paragraph 136 was being contented on likely documents
10:12:55 19 only. I now have your sentencing memorandum in front of me.
10:13:01 20 As you indicated, paragraph 136 indicates pled guilty, 30 days
10:13:06 21 in jail, all suspended on the menacing charge. Now run back
10:13:13 22 through with me why the government has not gotten there to
10:13:17 23 equate this.

10:13:18 24 MR. MORRIS: All right. In -- in just a minute I'll
10:13:23 25 point you to the --

10:13:24 1 THE COURT: We're at page 11, I think, of your ...

10:13:32 2 MR. MORRIS: If you go to -- this is guideline 4A1.2,
10:13:43 3 section -- subsection (c).

10:13:48 4 THE COURT: 4A1.2. All right.

10:13:56 5 MR. MORRIS: Subsection (c), Sentences Counted and
10:13:59 6 Excluded. And then further in subsection (1): Sentences for
10:14:08 7 the following prior offenses and offenses similar to them, by
10:14:12 8 whatever name they are known, are counted only if the sentence
10:14:17 9 was a term of probation of at least one year or a term of
10:14:20 10 imprisonment of at least 30 days, or (B) the prior offense was
10:14:24 11 similar to an instant offense: Disorderly conduct and
10:14:35 12 disturbing the peace -- or disturbing the peace is one of those
10:14:40 13 that would not be counted.

10:14:41 14 And my argument is that menacing is similar to
10:14:47 15 disorderly conduct, just known by a different name. And since
10:14:51 16 his 30-day jail sentence was suspended, then it would not
10:14:56 17 count. And the reason I cited the Texas statute was to inform
10:15:01 18 the Court as to what disorderly conduct is. And I cited Ohio
10:15:08 19 menacing statute to let you know what that is. And the point
10:15:11 20 is they're similar offenses, just known by a different name.

10:15:18 21 THE COURT: All right. Thank you. So give me a
10:15:24 22 moment. Is that all you have on your objections, Mr. Morris?

10:15:26 23 MR. MORRIS: May I consult with Mr. Diehl just a
10:15:28 24 moment?

10:15:29 25 THE COURT: You may.

10:15:49 1 MR. MORRIS: Just offer one more issue with respect
10:15:51 2 to the password. It was apparently a very long and complicated
10:15:55 3 password that was written down and not memorized. It was
10:15:59 4 seized by the landlord once Mr. Diehl was arrested. All the
10:16:04 5 contents were -- there was an offer, to Mr. Diehl's
10:16:08 6 recollection, at least, of some sort to assist in opening that
10:16:13 7 and would still be willing to.

10:16:52 8 THE COURT: All right. Let me stress, as I always
10:17:06 9 stress in dealing with objections to a presentence
10:17:09 10 investigation report, I believe that we have gotten to a point
10:17:14 11 in our history with guidelines where post-*Booker*, *FanFan*, and
10:17:26 12 *Kimbrough* and the other rulings of the Supreme Court as well as
10:17:30 13 those of the Fifth Circuit, we probably spend way too much time
10:17:36 14 on the guidelines, since they are now advisory to the Court.
10:17:42 15 And the guidelines constitute just one factor under Title 18 of
10:17:53 16 the United States Code, Section 3553 for this Court to consider
10:18:00 17 in determining what an appropriate sentence would be.

10:18:02 18 However, the Court -- all District Courts are
10:18:07 19 obligated to compute the correct guideline sentence and then
10:18:14 20 use it as that factor. So we end up spending an awful lot of
10:18:17 21 time in that regard, which I consider largely nonproductive
10:18:26 22 when I'm looking at a statute that gives me a broader range to
10:18:30 23 sentence as I have. But that the law under which we operate.

10:18:41 24 With regard to Objection Number 1, the enhancement
10:18:44 25 for vulnerable victim, we have been over several times here

10:18:50 1 this morning what the application notes say. I find the
10:18:57 2 application notes to be clear here that I do not consider age
10:19:05 3 twice. So at that juncture, that would be a potential granting
10:19:14 4 of the objection, because I think the note is clear in that
10:19:20 5 regard, that if we start going back down the age scale from 12,
10:19:28 6 everything that involves the child getting younger is still
10:19:35 7 related to age and that involves even the trusting
10:19:39 8 relationship. So I will grant Objection Number 1, which
10:19:47 9 eliminates I think two points.

10:19:51 10 With regard to Objection Number 2, the enhancement
10:19:56 11 for the victim being physically restrained, again, when you
10:20:02 12 review the application notes on what it means, it does give
10:20:07 13 examples. There surely can be restraint other than in the
10:20:11 14 examples. I recall vividly what is on the evidence that was
10:20:20 15 presented to me on the CDs. I find that although there was
10:20:28 16 some touching, it does not rise to the level of the restraint
10:20:35 17 needed or anticipated by the guidelines. So I grant that
10:20:40 18 objection. That is another two points.

10:20:44 19 With regard to the objection, the two-point
10:20:48 20 enhancement for care, custody, and control, the defendant is
10:20:53 21 correct in that there is evidence both ways here. And with the
10:20:58 22 exception of the one incident, the -- the one time when the
10:21:10 23 child's mother and Mr. Diehl's wife concurred that there was a
10:21:14 24 babysitting situation, there are four others left which the --
10:21:21 25 there is no direct testimony about.

10:21:24 1 This can be proved -- again, the burden is on the
10:21:28 2 government to prove by a preponderance of the evidence what the
10:21:32 3 circumstances were. Again, the Court recalls the videos --
10:21:37 4 what is on the videos. I recall what appeared to be or recall
10:21:43 5 what the actions of the child, Jane Doe Number 3, and the
10:21:51 6 defendant were, what their demeanors were, whether they were
10:21:57 7 active, either one of them appeared to be at all concerned that
10:22:01 8 anyone would walk in on them. They did not appear to be that
10:22:07 9 way.

10:22:08 10 The trusting relationship I think has more of an
10:22:13 11 application here than it did in Objection Number 1. The
10:22:18 12 families were close. I find that all of the circumstantial
10:22:27 13 evidence supports that Jane Doe Number 3 was in the care or
10:22:31 14 custody of Mr. Diehl at the time of the incidents, whether the
10:22:35 15 parties -- or whether the child's mother or Mr. Diehl's wife
10:22:40 16 can remember the exact circumstances or not.

10:22:46 17 These incidents did take place over a period of
10:22:50 18 time. The government has satisfied its burden that the
10:22:54 19 families were close. I find that the circumstantial evidence
10:23:05 20 supports by a preponderance of the evidence that Jane Doe
10:23:08 21 Number 3 was in fact in the care, custody, and control of the
10:23:10 22 defendant when the incidents occurred such that the objection
10:23:14 23 is denied and the two-point enhancement stays.

10:23:18 24 With regard to Objection Number 4, the failure to
10:23:29 25 grant the third point for accepting responsibility, I

10:23:33 1 understand the argument that Mr. Diehl did not force the
10:23:39 2 Government through a complete jury trial, that Mr. Diehl did
10:23:47 3 stipulate to certain evidence, and that it was easier to
10:23:52 4 proceed and a better use of court resources to proceed in this
10:23:56 5 manner with the preservation of the interstate commerce nexus.
10:24:02 6 The Probation Department, recognizing all of those things, has
10:24:05 7 granted two points for acceptance of responsibility.

10:24:10 8 The fact of the matter is we still conducted a
10:24:13 9 trial. The fact of the matter is there is likely to be an
10:24:16 10 appeal after we conclude this hearing today. That appeal is
10:24:21 11 likely to at least in part center around the interstate
10:24:26 12 commerce nexus, which the government was forced to prove. So
10:24:31 13 this Court will deny the request for a third point of
10:24:37 14 acceptance of responsibility because a trial was still
10:24:42 15 conducted.

10:24:43 16 With regard to the grouping issue, I do find that the
10:24:49 17 incidents were separate; that the government separated them
10:24:53 18 carefully. I recall all of the evidence. I find, therefore,
10:24:57 19 that 3D1.1 does not apply, and I deny that request.

10:25:04 20 With regard to the criminal conviction set forth in
10:25:15 21 paragraph 136, I find that to be a particularly difficult
10:25:29 22 situation to deal with. The defendant sets forth in his most
10:25:35 23 recent sentencing memorandum the Ohio Code provision on which
10:25:43 24 that conviction is based, which reads: No person shall
10:25:46 25 knowingly cause another to believe that the offender will cause

10:25:51 1 physical harm to the person or property of such other person or
10:25:56 2 member of his immediate family.

10:25:58 3 The defendant attempts to equate that with the Texas
10:26:03 4 disorderly conduct statute as an example of disorderly conduct
10:26:10 5 not being counted that is used in the guidelines and states
10:26:17 6 that the type of conduct criminalized as disorder conduct
10:26:22 7 closely resembles that criminalized by the Ohio menacing law.

10:26:26 8 Now, what we have here in the Texas statute is
10:26:34 9 subparagraph (1): Use of abusive, indecent, profane, or vulgar
10:26:40 10 language in a public place that, by its utterance, would tend
10:26:45 11 to incite a breach of the peace; an offensive gesture that
10:26:52 12 would tend to incite a breach of the peace; an obviously
10:26:57 13 offensive manner that abuses or threatens a person; fighting
10:27:02 14 with another -- that implies to me that both parties are in a
10:27:09 15 fight -- or the display of a firearm.

10:27:11 16 I find that to be different than causing another to
10:27:16 17 believe that the offender will cause physical harm. I find
10:27:21 18 that there is a temporal element in the disorderly conduct laws
10:27:27 19 that is not present in menacing. So although I find that to be
10:27:34 20 a reasonably close call, I think the Probation Department is
10:27:39 21 correct in their analysis that it is different. And so I deny
10:27:49 22 that objection.

10:27:50 23 Now, before we leave the scoring objections, I want
10:27:54 24 to make sure we have agreement on where that leaves us with
10:28:00 25 regard to the guidelines, because this is one of those cases

10:28:05 1 where the guidelines, because of the number of counts and the
10:28:11 2 way you compute and then the way they are utilized needs to be
10:28:16 3 carefully looked at. So let me inquire.

10:28:20 4 What I have done is reduced by a total of four
10:28:27 5 points. Let me ask Probation, first: Does that have the
10:28:32 6 effect of -- the easy way of reducing the total offense level
10:28:37 7 from 40 to 36 and leaving the criminal history category as II?
10:28:41 8 Or does there have to be further calculations made up and down
10:28:45 9 the line to come up with the total offense level?

10:28:50 10 PROBATION OFFICER: Further calculations,
10:28:53 11 Your Honor.

10:28:53 12 THE COURT: Pardon me?

10:28:54 13 PROBATION OFFICER: Further calculations, and I can
10:28:55 14 come up with it.

10:28:56 15 THE COURT: All right. Would you do that?

10:28:57 16 PROBATION OFFICER: Yes.

10:28:57 17 THE COURT: And I ask both the government and the
10:28:59 18 defendant to look, too, because before we depart from this
10:29:02 19 stage in the hearing, I want to make sure we have an agreement
10:29:06 20 as to what the effect of the Court's rulings are. And at this
10:29:11 21 time, while y'all do that, I think we'll take a ten-minute
10:29:16 22 recess. Everybody's been sitting for an hour and a half now.
10:29:18 23 So the Court will be in recess for ten minutes.

10:29:22 24 (Recess)

10:43:27 25 THE COURT: During the recess, the

10:43:29 1 Probation Department came back and indicated to me that they
10:43:32 2 believe it would be a total offense level of 36 and a criminal
10:43:35 3 history category of II after my rulings on the objection. Does
10:43:40 4 the government concur with that?

10:43:41 5 MR. DEVLIN: Based on your rulings, Judge, yes.

10:43:43 6 MR. MORRIS: So does the defense, Your Honor. We
10:43:46 7 think that's correct.

10:43:47 8 THE COURT: All right. Then the presentence
10:43:49 9 investigation report is modified to reflect a total offense
10:43:53 10 level of 36 and a criminal history category of II. And to the
10:43:59 11 extent that I consider a guideline sentence, the appropriate
10:44:04 12 range would be 210 to 262 months confinement and the
10:44:09 13 appropriate fine range would be a fine of between \$20,000 and
10:44:15 14 \$200,000.

10:44:17 15 Now, Mr. Morris, we're back to you. If you want to
10:44:21 16 come back forward, you have some non-scoring objections that
10:44:28 17 you want to -- and you may proceed with your non-scoring
10:44:39 18 objections.

10:44:39 19 MR. MORRIS: First one, Your Honor, is we object to
10:44:42 20 the inclusion of the mention of the Google search and the Web
10:44:46 21 page in paragraph 18 of the presentence investigation report.
10:44:50 22 And the basis of the objection Mr. Orr filed is that the Web
10:44:59 23 site that belongs with the URL is basically a government Web
10:45:06 24 site that has nothing to do with the procurement of child
10:45:13 25 prostitution or the procurement of child sex. It's simply -- I

10:45:19 1 guess "simply" is the right word. What it does is it explains
10:45:22 2 that it is a problem in Nicaragua and that there are things
10:45:28 3 being done about it.

10:45:29 4 And leaving it in the presentence report is -- leaves
10:45:32 5 the inference that Mr. Diehl was using the Internet to try to
10:45:40 6 find child prostitutes. And that's simply not the case. And I
10:45:43 7 have a printout of the web page that that URL is associated
10:45:48 8 with that I can provide the Court with.

10:45:52 9 THE COURT: You may. All right. Proceed.

10:45:57 10 MR. MORRIS: And with respect to the second
10:46:01 11 non-scoring objection, Defendant objects to the description of
10:46:07 12 the acts allegedly shown in the videos being placed in the
10:46:10 13 presentence investigation report. Actually, we understand why
10:46:14 14 they were there originally, to justify the guideline
10:46:18 15 calculation. But we ask that they be removed. And the reason
10:46:22 16 or the basis of that is Rule 32 of the Federal Rules of
10:46:31 17 Criminal Procedure. And, specifically, the (d)(3) exclusions.

10:46:51 18 The presentence investigation report must exclude the
10:46:56 19 following: And then (C): Any other information that, if
10:47:00 20 disclosed, might result in physical or other harm to the
10:47:03 21 defendant or others.

10:47:05 22 If this information, the nature of the conduct and
10:47:10 23 videos is disclosed, it would certainly subject Mr. Diehl in
10:47:15 24 prison to reprisal. The Court's certainly well aware, it's
10:47:19 25 certainly common knowledge, that inmates who have been

10:47:21 1 convicted of this type of offense are subjected to harsh
10:47:26 2 treatment by other inmates in penal institutions. And,
10:47:30 3 consequently, we ask that the descriptions of what is contained
10:47:34 4 in the video be removed from the presentence report.

10:47:49 5 And the Court has dealt with my Objection Number 3 in
10:47:58 6 the hearing that we had in chambers.

10:48:06 7 The fourth non-scoring objection is, Defendant
10:48:09 8 objection to the description of videos as having been filmed
10:48:13 9 with a hidden camera. The basis of that objection is that
10:48:16 10 there is no evidence to support that there was a hidden camera,
10:48:19 11 and it -- that it was used in the filming of any of these
10:48:24 12 videos.

10:48:25 13 And Defendant objects to the finding regarding the
10:48:30 14 financial ability in paragraph 174. 174 lists the assets that
10:48:40 15 Mr. Diehl had when this case began. And based on that, it
10:48:49 16 says, Considering defendant's assets and his liabilities, the
10:48:52 17 fact that he was able to retain counsel and his potential
10:48:56 18 earnings profits, the defendant appears to be able to pay a
10:48:59 19 reasonable fine.

10:49:00 20 Well, his earnings and profits are zero at this point
10:49:03 21 and will be zero for the foreseeable future. And he liquidated
10:49:11 22 a lot of his assets to provide for legal counsel and other
10:49:17 23 expenses involved in this case. And we'd ask that the Court to
10:49:20 24 find that he is not able to pay a fine.

10:49:24 25 And with respect to the mention in the presentence

10:49:33 1 report the possible grounds for upward departure, that's in
10:49:37 2 paragraph 190, I've addressed that in my presentence -- in my
10:49:41 3 sentencing memorandum. The grounds that are cited by the
10:49:53 4 Probation Department is possible justification for upward
10:49:57 5 departure.

10:50:04 6 The first one is that his criminal history
10:50:07 7 under-represents the seriousness of his conduct. We -- we
10:50:15 8 suggest that, if anything, it over-represents Mr. Diehl's
10:50:21 9 criminal conduct. The convictions that are scored are well --
10:50:26 10 are over 20 years old. They properly scored because the
10:50:30 11 relevant time period begins at the date of the incident
10:50:34 12 offense, but it had been 20 years since those offenses were
10:50:39 13 committed. And they're simply no reason to think that they
10:50:44 14 under-represent his criminal history.

10:50:47 15 And then in paragraph 191, extreme conduct, first of
10:50:55 16 all, there is nothing in those videos that indicates that there
10:51:02 17 was torture, gratuitous infliction of injury or prolonging of
10:51:07 18 the pain or humiliation. The Court saw the videos. Again, I
10:51:12 19 certainly understand these were reprehensible acts on the
10:51:16 20 videos. But that -- those are the type of actions that we see
10:51:19 21 in the majority of the cases under this guideline. Where there
10:51:28 22 is production of videos, all these sorts of things are in the
10:51:31 23 common case. They're simply not extraordinary in this case.

10:51:36 24 And with respect to the allegation that there was
10:51:42 25 penetration and it's likely both females suffered physical

10:51:45 1 pain, the Court has seen the videos. While there may -- under,
10:51:48 2 for instance, the Texas definition of penetration, it's
10:51:51 3 possible there was slight penetration, there was no full-on
10:51:54 4 penetration in these videos. And there was nothing in the
10:51:58 5 videos that indicated that either -- that either of these
10:52:02 6 children experienced any pain. And so we submit that there is
10:52:08 7 no reason for upward departure on that basis.

10:52:11 8 And also I point out, with respect to the -- the
10:52:18 9 grounds cited by the Probation Department that these films were
10:52:22 10 exploited on the Internet, just that broad statement makes it
10:52:26 11 sound like that anybody could go to a search engine such as
10:52:30 12 Google and type in the names of these videos and come up with
10:52:33 13 the videos. That's simply not how videos are distributed like
10:52:38 14 this, and the investigation in this case bore that out.

10:52:42 15 They are available to a very small number of people
10:52:46 16 who know how to find them. They are downloaded through things
10:52:49 17 such as usenet, eMule, things that I'm not entirely familiar
10:52:53 18 with. But they appear to be file sharing protocols, and it's
10:52:58 19 not as though these videos are being accessed every day at
10:53:03 20 random by somebody on the Internet. So while the Internet is
10:53:07 21 the means that people acquire them, it's not a widespread
10:53:11 22 distribution of them.

10:53:14 23 That's all I have on those non-scoring objections.

10:53:17 24 THE COURT: All right. Mr. Devlin, I'll hear from
10:53:19 25 you on the non-scoring objections.

10:53:20 1 MR. DEVLIN: As to the inclusion of the Google
10:53:31 2 search, Judge, I don't think it's coincidence that this Google
10:53:38 3 search about Nicaragua sex and terrorism was found on the
10:53:40 4 defendant's computer. In an interview done with -- I'm going
10:53:43 5 to proffer this. In an interview done with the defendant's
10:53:45 6 sister Amy Lainhart on April 9th, of 2010, right after his
10:53:50 7 arrest, she advised the FBI agent who interviewed her that the
10:53:55 8 defendant is attracted to younger girls. She stated that the
10:53:59 9 defendant is a pedophile, and she said that she would not be
10:54:02 10 surprised if the defendant was involved in child pornography.

10:54:06 11 But more to the point, she said that -- she said that
10:54:08 12 Diehl, the defendant, traveled overseas for the purpose of
10:54:11 13 meeting with young girls and has apparently stated to her in
10:54:15 14 the past that, quote, You can buy a couple of girls for the
10:54:18 15 price of a pair of gym shoes, unquote. That was information
10:54:22 16 obtained in an interview with the defendant's sister back at
10:54:25 17 the time of his arrest.

10:54:26 18 So, again, while we have not charged him with
10:54:30 19 international sex tourism, I don't think he was looking at
10:54:36 20 Nicaragua sex and terrorism with a concern that there was a
10:54:40 21 problem that he was going to help alleviate.

10:54:43 22 So I think the Court can consider that for whatever
10:54:46 23 weight it wants to give it.

10:54:51 24 The second -- my response to the second objection,
10:54:54 25 Judge, as far as description of the acts is that the PSR is

10:54:59 1 obviously going to be used in the future by the Bureau of
10:55:02 2 Prisons in evaluating the defendant's treatment, the
10:55:07 3 defendant's program, whatever legitimate purposes they have.
10:55:11 4 They are not going to have access to the videos. They're not
10:55:14 5 going to have access to any of the victims who were video-ed.
10:55:19 6 They're going to have some indication of what is in the video,
10:55:27 7 and a more detailed description is preferable to a less
10:55:31 8 detailed description.

10:55:32 9 The defendant has not alleged that anything is
10:55:34 10 inaccurate in the description. He's just concerned apparently
10:55:37 11 that, you know, he's not going to get to release his PSR to
10:55:41 12 other inmates without that information in there. Nobody is
10:55:44 13 going to release it to any inmates, Judge on the government's
10:55:47 14 side, anyway, and the BOP needs that information to be able to
10:55:53 15 do appropriate evaluations that it sees fit and in addition to
10:55:59 16 probably just determining his initial custody level.

10:56:02 17 So I don't think that Rule 32 in any way prevents
10:56:06 18 that from being in there. That's the crux of the offense.
10:56:10 19 It's not gratuitous information. It derives directly from the
10:56:14 20 videos that the Court has. So I think that there's every
10:56:16 21 legitimate reason to have that in there. And, again, there's
10:56:19 22 been no allegation that those are inaccurate.

10:56:22 23 I guess the third objection has been withdrawn?

10:56:25 24 MR. MORRIS: That's correct. Well, not withdrawn.
10:56:27 25 It was overruled.

10:56:28 1 THE COURT: All right.

10:56:29 2 MR. DEVLIN: It's been ruled on, so I don't need to
10:56:32 3 address that. The fourth objection about the hidden cameras,
10:56:35 4 again, the Court can decide for itself what that -- what that
10:56:38 5 was going on there. The other thing, I'm going to refer back
10:56:44 6 to the interview with Ms. Lainhart is that -- and I think it's
10:56:47 7 already even in the presentence investigation report in
10:56:51 8 paragraph 156. She was a witness to a video that the defendant
10:56:57 9 made with a 15-year-old girlfriend from the early '90s when the
10:57:04 10 defendant was in his late 20s. And that -- we had advised
10:57:08 11 Mr. Diehl of that offense as part of our 404(b) notice way back
10:57:13 12 when prior to trial and that that -- we believed that was
10:57:19 13 surreptitiously done.

10:57:20 14 So he's got a long history of hidden camera
10:57:24 15 activities. I think it's pretty clear from that video that was
10:57:27 16 introduced that that was a hidden camera. You saw him
10:57:32 17 adjusting the camera. It was under a blanket. And then
10:57:35 18 moments later, two girls come in and are playing. And there's
10:57:39 19 other -- I think one of the videos shows the fourth victim in a
10:57:44 20 bathroom doing various things clothed, and that was clearly
10:57:49 21 done with a hidden camera, given the position of the camera.

10:57:53 22 So what his objection is to having it called a hidden
10:57:56 23 camera, I don't know. There's more than enough evidence to
10:57:59 24 indicate the defendant was quite well-versed in using hidden
10:58:03 25 cameras.

10:58:03 1 And as far as his financial ability, Judge, I'm going
10:58:07 2 to comment on that later, but I may as well comment on that
10:58:10 3 now. He spent untold amount of money and resources in this
10:58:13 4 legal proceeding and also in a legal proceeding regarding
10:58:16 5 custody of his son that, frankly, in my opinion were futile.
10:58:22 6 The evidence in this case is so overwhelming that his efforts
10:58:27 7 to spend all this money on himself and his defense here, while
10:58:32 8 it's certainly his right -- and I'm not criticizing Mr. Morris
10:58:35 9 or Mr. Orr -- but all that money could have gone to his son.

10:58:38 10 And I think it also plays into his claim that he's
10:58:44 11 been a good father. I don't think a good father would go and
10:58:47 12 spend all of -- basically everything he has to leave nothing
10:58:51 13 for his son to go up against legal proceedings that he has no
10:58:57 14 chance of winning given the strength of evidence. He's trying
10:59:00 15 to get custody for his son. He's going to prison for a long
10:59:04 16 time. What is he trying to get there? I attended one of those
10:59:06 17 court hearings, and he's disputing everything that he can with
10:59:08 18 his ex-wife.

10:59:10 19 So I think that while it -- he may not have the
10:59:13 20 financial resources, I think the fact that he has spent them on
10:59:17 21 himself instead of spending them on his son or leaving it for
10:59:21 22 his son so that his son can benefit from it shows once again
10:59:25 23 his selfish and arrogant behavior.

10:59:28 24 But, nevertheless, I don't know what his financial
10:59:31 25 situation is. But whatever it is, it's a lot worse than when

10:59:35 1 he was arrested because of all of the money on needless lawyers
10:59:38 2 and needless legal proceedings.

10:59:41 3 And as far as departures go, Judge, I'd like to save
10:59:45 4 that for when we make our argument. Thank you.

10:59:47 5 THE COURT: Mr. Morris, response?

10:59:49 6 MR. MORRIS: I'm not sure exactly what the
10:59:58 7 government's argument was with respect to financial ability.

11:00:03 8 Let me address what I think it was, that it's wrong to spend
11:00:09 9 money on lawyers if it's not going to do you any good. I don't
11:00:12 10 know what the alternative is. Mr. Diehl did not qualify for a
11:00:16 11 court-appointed lawyer. He was facing very serious charges.
11:00:22 12 Even if he had on day one decided to plead guilty to all those
11:00:26 13 charges, we would be having this hearing right now today.

11:00:29 14 THE COURT: You don't need to belabor that point.
11:00:31 15 I'm aware of the age of this case and how long it's gone on and
11:00:35 16 what lawyers do. And that is -- believe me, the financial
11:00:40 17 ability of Mr. Diehl is not where I think issue is really
11:00:45 18 joined in this case.

11:00:46 19 MR. MORRIS: Thank you, Your Honor. I would point
11:00:48 20 out that he's continued to pay child support during this time
11:00:52 21 and he has continued with his obligations to his son. That's
11:00:56 22 all the rebuttal I have, Your Honor.

11:00:59 23 Oh, one more thing, Your Honor. With respect to
11:01:02 24 Mr. Diehl's sister and the allegations that he was traveling
11:01:07 25 overseas for purposes of meeting girls: First of all, I'd like

11:01:10 1 to point out that when Ms. Lainhart, I believe is her name, was
11:01:16 2 interviewed, she was in jail for a felony conviction. She has
11:01:19 3 a long history of mental issues. She is the mother of Jane Doe
11:01:25 4 2, which certainly gives her a reason to be a bit bias.

11:01:30 5 She also -- the travel overseas that described that
11:01:34 6 Mr. Diehl was engaging in to -- as she put it, to find young
11:01:39 7 girls was to Brazil where he was going overseas to work. I put
11:01:44 8 in the sentencing memorandum a conversation I had or reference
11:01:47 9 to a conversation I had with someone who went to Brazil to see
11:01:51 10 him while he was there. He had an adult girlfriend while he
11:01:54 11 was there that he continued to correspond via E-mail. I
11:01:58 12 reviewed those E-mails. It's obvious from reading the E-mails,
11:02:01 13 her talking about her working in a psychologist's office,
11:02:05 14 family issues, that she is at least an adult and probably a
11:02:10 15 very mature adult. So Mr. Diehl's sister's representations
11:02:15 16 about him are simply suspect.

11:02:17 17 THE COURT: Thank you.

11:02:19 18 With regard to the non-scoring objections, the
11:02:25 19 presentence investigation report is quite thorough. And like
11:02:30 20 all thorough reports that this Court receives, there are
11:02:33 21 certain items that are entitled to more weight than other items
11:02:38 22 and certain items have more effect on the Court's making of a
11:02:42 23 decision as to an appropriate sentence than others.

11:02:47 24 The non-scoring objections are all overruled. I
11:02:56 25 overrule Objection Number 1 because it is what it is. What

11:03:00 1 the -- what the Probation Department put in there is what the
11:03:07 2 Probation Department found. But the basis for the sentence
11:03:14 3 this Court is going to impose is going to be primarily based on
11:03:19 4 the evidence that was produce before the Court at the trial.
11:03:25 5 I'm not going to place any weight on the statements in
11:03:30 6 paragraph 18 about whether this defendant was or was not
11:03:35 7 planning a trip to Nicaragua.

11:03:38 8 The description of the acts in paragraphs 23 through
11:03:41 9 34, Non-scoring Objection Number 2, are accurate and correct.
11:03:48 10 The presentence investigation report is going to be sealed. It
11:03:52 11 will only be distributed to those persons who have a need to
11:03:58 12 know or who Mr. Diehl chooses to distribute his copy to. I do
11:04:07 13 agree with the government, that the description of what
11:04:10 14 occurred is necessary for the Bureau of Prisons.

11:04:14 15 I have already ruled on the unsubstantiated reference
11:04:18 16 to a fourth victim in paragraph 37. I have plenty of evidence
11:04:23 17 before me on the three victims that were listed in the
11:04:29 18 indictment and for which I entertained evidence during the
11:04:32 19 trial of this case. And so for the same reasons that I have
11:04:36 20 previously stated, I restate them in overruling Non-scoring
11:04:42 21 Objection 3.

11:04:44 22 With regard to Objection 4, the hidden camera, it is
11:04:48 23 clear that at least one time and perhaps others, but clearly
11:04:56 24 displayed in one of the videos, is the use of a hidden camera.

11:05:03 25 As I stated with regard to financial ability, that is

11:05:09 1 not something that is going to have a large effect on the Court
11:05:19 2 in determining the appropriate sentence to impose in this
11:05:21 3 case. I recognize what the fine ranges are under both the
11:05:25 4 statute and the guidelines and will deal with that accordingly
11:05:30 5 if I think a fine is appropriate.

11:05:33 6 I take into account, regardless of how Mr. Diehl
11:05:37 7 spent his money, whether it was wise or not, he has been
11:05:43 8 incarcerated since April 6th of 2010 and I'm sure that whatever
11:05:53 9 ability he had has been greatly reduced.

11:05:57 10 And with regard to the findings regarding departures,
11:06:02 11 that is customary for the Probation Department to give the
11:06:06 12 Court guidance if the Court determines to depart. And that's
11:06:10 13 why that information is provided to the defendant and to the
11:06:14 14 government. So I overrule each of the non-scoring objections
11:06:20 15 for the reasons that I have stated.

11:06:22 16 Mr. Diehl, Mr. Morris, please come back forward. The
11:06:33 17 rulings on all of the objections, scoring and non-scoring,
11:06:38 18 having been made by this Court, Mr. Morris do you know of any
11:06:43 19 legal reason why the Court should no proceed with sentencing at
11:06:46 20 this time?

11:06:47 21 MR. MORRIS: Your Honor, we'd like to address the
11:06:49 22 Court with respect to the factors contained in 3553.

11:06:53 23 THE COURT: Well, that will determine what my
11:06:56 24 sentence will be. Is that what you want to address? Do you
11:07:00 25 know of any legal reason why the Court should not proceed with

11:07:04 1 sentencing at this time?

11:07:05 2 MR. MORRIS: No, your Honor. From your comment, it
11:07:07 3 sounded like you were about to proceed to --

11:07:09 4 THE COURT: No, no. You will have an opportunity to
11:07:11 5 speak. Everyone will have an opportunity to speak. I just
11:07:15 6 wanted to know if you know of a legal reason why I should
11:07:17 7 terminate this proceeding and not proceed with sentencing at
11:07:21 8 this time?

11:07:22 9 MR. MORRIS: No, Your Honor.

11:07:22 10 THE COURT: Mr. Devlin, does the government know of
11:07:24 11 any legal reason why the Court should not proceed with
11:07:26 12 sentencing at this time?

11:07:27 13 MR. DEVLIN: No, sir.

11:07:30 14 THE COURT: Now, Mr. Diehl, Mr. Morris, if either or
11:07:32 15 both of you have anything you would like to say to the Court
11:07:35 16 before the Court pronounces sentence, I will hear from you at
11:07:39 17 this time and I will take into account everything that you have
11:07:43 18 to say in determining what I think the appropriate sentence to
11:07:48 19 impose in this case is. And so, Mr. Morris, at this time you
11:07:54 20 may address the 3553 factors or any other matter that you wish
11:08:00 21 to draw to the Court's attention before the Court pronounces
11:08:03 22 sentence.

11:08:03 23 MR. MORRIS: Your Honor, we'd like to address the
11:08:06 24 3553 factors, and I've set out the basis of what I'm going to
11:08:12 25 address beginning with page 14 of my sentencing memorandum.

11:08:20 1 And the factor that I intend to address are the circumstances
11:08:24 2 of the offense and the characteristics of Mr. Diehl.

11:08:29 3 I begin by pointing out to the Court that the
11:08:32 4 offenses that the Court has to consider sentence of occurred
11:08:38 5 more than ten years ago. The -- we look at Mr. Diehl's life at
11:08:46 6 that point and then contrast it to what he has done since then
11:08:50 7 with his life, it bears consideration by the Court. At the
11:08:54 8 time Mr. Diehl committed these offenses, he was living a
11:09:01 9 lifestyle that he readily admits was a mistake and that his
11:09:06 10 lifestyle -- spending a lot of time at Star Ranch with his
11:09:10 11 family and with one of the children who ultimately became a
11:09:16 12 victim for a short time was out there.

11:09:18 13 During this time, Mr. Diehl was also -- had also
11:09:22 14 suffered a motorcycle accident, and he was in pain. He was
11:09:27 15 prescribed Oxycontin. He was also drinking heavily -- more
11:09:32 16 heavily than he should have been. He believes that these
11:09:35 17 factors contributed very much to his lapse of judgment and his
11:09:39 18 wrongful acts at this time.

11:09:42 19 But ready -- certainly the Court focuses on the acts
11:09:49 20 committed. But expanding that view and looking at Mr. Diehl's
11:09:52 21 life since that time, Mr. Diehl has always been gainfully
11:09:57 22 employed as a very good software engineer, a very good
11:10:00 23 programmer. I provided the Court with a resume as an
11:10:04 24 attachment to the sentencing memorandum showing his work
11:10:07 25 history. He has done contract work for years and years and is

11:10:12 1 well-respected in his profession. He in fact has always earned
11:10:19 2 a living, always supported his dependents.

11:10:22 3 And speaking of dependents, Mr. Diehl is the father
11:10:25 4 of A., the young man that the Court saw testify here. He's put
11:10:30 5 a great deal of energy into raising his son, into trying to
11:10:36 6 steer his son in the right direction. There's been testimony
11:10:40 7 that he's -- and other information that he's cautioned A. on
11:10:44 8 who to stay away from as far as people that might try to
11:10:48 9 sexually abuse him. He's -- Mr. Diehl has made sure that.
11:10:55 10 A. has gotten a good education. He's also coached him and
11:10:59 11 encouraged him to pursue his tennis avocation. A. is in the
11:11:05 12 top 50 in the State of Florida for tennis.

11:11:09 13 Maybe one of the more important factors I'd ask the
11:11:15 14 Court to consider is what happened to him when he was young.
11:11:19 15 We can talk about to what extent that affects a person later in
11:11:24 16 life, but I think we all agree it affects him somewhat.
11:11:27 17 Mr. Diehl was abused as a young man. He was abused by --
11:11:31 18 sexually abused by a person in a position of trust. It was a
11:11:38 19 probation officer or counselor that he was assigned --
11:11:40 20 counselor I believe that he was assigned to by the juvenile
11:11:43 21 court. And not only was he abused, he was drugged and abused,
11:11:49 22 an even more heinous act. And certainly he was a vulnerable
11:11:55 23 victim during those acts. And then just a year or so later,
11:11:59 24 another incident occurred when he was 13 years old. He was
11:12:03 25 again sexually abused. Now, I ask the Court to consider --

11:12:08 1 consider that and the circumstances in Mr. Diehl's life.

11:12:13 2 Since the time of commission of these offenses,
11:12:20 3 there's no indication other than testimony of Mr. Courtney, who
11:12:24 4 I'll talk about in a minute, that Mr. Diehl has even engaged in
11:12:29 5 any activity of child pornography. And, certainly, there is no
11:12:34 6 evidence from any source that he has repeated the conduct that
11:12:37 7 he was convicted of here, that he produced more child
11:12:41 8 pornography.

11:12:41 9 The only evidence that he's had anything to do with
11:12:44 10 child pornography is the testimony of Ken Courtney. The Court
11:12:48 11 heard Mr. Courtney's testimony. The Court perhaps expressed
11:12:51 12 some reservations of its own with respect to the truthfulness
11:12:56 13 of Mr. Courtney. You stated in your ruling that you believed
11:12:59 14 him to the extent that he saw some -- saw something in
11:13:01 15 Florida. Mr. Diehl adamantly denies that he showed
11:13:08 16 Mr. Courtney any pornography and that he had a collection of
11:13:12 17 child pornography.

11:13:14 18 I'd be happy to cooperate with the government in
11:13:17 19 decrypting the disk they have to show it has no child
11:13:21 20 pornography. His wife, his son had access to his computer
11:13:25 21 during this time. Certainly, if it would have had child
11:13:30 22 pornography, that would not have been the case. There's been
11:13:32 23 an extensive investigation by the FBI. There was nothing that
11:13:36 24 turned up that indicated he was in possession of child
11:13:38 25 pornography.

11:13:40 1 They canvassed the neighborhood where he lived in the
11:13:43 2 Austin area. No one else came forward that had been engaged in
11:13:48 3 the production activities. There were many other children that
11:13:53 4 he was around that the FBI interviewed, his other nieces, no
11:13:57 5 outcry there. There is simply nothing to indicate that he was
11:14:00 6 involved in child pornography after this period in his life.

11:14:15 7 The conduct in the videos itself, I'll ask the Court
11:14:18 8 to consider this: While reprehensible -- and I'm certainly not
11:14:22 9 making any excuses or trying to minimize it to other than what
11:14:25 10 is apparent, while these are reprehensible acts, they did not
11:14:32 11 involve sexual intercourse. They did not involve penetration
11:14:35 12 as perhaps that would commonly be understood. And I contrast
11:14:40 13 this with many of the cases that I've cited in my sentencing
11:14:44 14 memorandum where the conduct was simply much, much worse.

11:15:03 15 Another thing I'd ask the Court to consider would be
11:15:07 16 the need to avoid disparate sentences. What I ask the Court to
11:15:13 17 consider is what other courts have done with other similar
11:15:16 18 conduct sentenced under the same guideline that occurred during
11:15:20 19 the same period of time. The government has urged the Court to
11:15:24 20 consider the guidelines as they're written now. For what
11:15:30 21 purpose is not clear, but they have urged that the Court do
11:15:33 22 that.

11:15:33 23 The guidelines as they are written now were not
11:15:36 24 developed as guidelines ordinarily are. They were developed in
11:15:44 25 accordance with Congressional mandate. There was no study or

11:15:47 1 no empirical studies done to determine whether there was a need
11:15:51 2 for that drastic increase in the guidelines. There were no
11:15:54 3 hearings held to take comment on why those should be
11:15:58 4 increased. They were simply done by Congressional fiat.

11:16:02 5 What I think is much more instructive to the Court is
11:16:06 6 the history of sentencing under this particular guideline
11:16:09 7 for -- for cases that occurred during the same time period.
11:16:15 8 The statistics from the Sentencing Commission indicate that
11:16:23 9 there are about as much upward departures as there are downward
11:16:28 10 departures under 2K -- or 2G2.1. And I cited in page 3 of my
11:16:33 11 sentencing memorandum a table that sets that out. And,
11:16:36 12 generally, the guidelines are used as a guide in sentencing.

11:16:40 13 Now, we'd ask the Court to depart downward, however,
11:16:43 14 in this -- or vary downward under 3353 factors in this case
11:16:50 15 because of the fact I've mentioned. They also, I will point
11:16:52 16 the Court, to a few cases that appear to be very similar to
11:17:02 17 Mr. Diehl's case where the Court gave a sentence in the range
11:17:07 18 that we're suggesting that the Court give.

11:17:14 19 First we cited in the supplemental sentencing
11:17:19 20 memorandum *United States v. Counentos*. It's an 8th Circuit
11:17:24 21 case. This one is almost on all fours with the defendant's
11:17:27 22 case. There were three children involved. One of -- some of
11:17:31 23 the conduct involved was oral sex. The date of the offense was
11:17:35 24 around 2001. The same guideline range or same general
11:17:40 25 guideline structure applies. The sentence in this case was

11:17:45 1 120 months, and the -- that was after a trial. So the Court
11:17:53 2 considered all of the factors and arrived at 120 months as
11:17:57 3 being the proper sentence.

11:17:59 4 Another case is *United States v. Smart*, again, 120
11:18:03 5 months. That was a case out of, I believe, the Southern
11:18:09 6 District of Texas. Again, same type of activities.

11:18:13 7 And then *United States v. Crow* out of the Southern
11:18:16 8 District of Texas. Again, 120 months, same type of activity as
11:18:20 9 the other cases that are cited in supplemental sentencing
11:18:24 10 memorandum.

11:18:27 11 And, certainly, the basic factors that we suggest to
11:18:29 12 the Court should be considered under 3553 are the length of
11:18:34 13 time since these offenses have been committed, what Mr. Diehl
11:18:38 14 has done with his life since the commission of these offenses,
11:18:43 15 the sexual abuse that he underwent as a child and how that may
11:18:47 16 have affected his judgment in these cases -- and these
11:18:52 17 instances, the medication he was on and the extent that might
11:18:57 18 have affected his judgment, and the other sentences that
11:19:00 19 this -- that other courts have handed down in similar
11:19:03 20 circumstances.

11:19:04 21 And Mr. Diehl I believe would also like to address
11:19:06 22 the Court with respect to some of those factors.

11:19:09 23 THE COURT: Mr. Diehl, you may proceed.

11:19:12 24 THE DEFENDANT: I -- this was a terrible lapse of
11:19:17 25 judgment. It was one hour of video. I apologize for breaching

11:19:26 1 everybody's trust and causing this. I understand how important
11:19:30 2 trust is. This doesn't reflect me. Since that incident -- or
11:19:37 3 before that incident, as Mr. Morris pointed out, we started
11:19:42 4 going to nudist camps and we went a lot. And everybody is
11:19:46 5 naked and running around and jumping on each other, and it
11:19:49 6 affected my judgment and I made some terrible judgment calls
11:19:53 7 and recognized it and did my best to make sure it never
11:19:57 8 happened again.

11:19:59 9 And I have worked hard, and I have been a devoted
11:20:03 10 father. And I have a teenager, and I'd like the opportunity to
11:20:12 11 serve a sentence that punishes me but to get out -- to get out
11:20:22 12 and be able to help my child succeed.

11:20:26 13 MR. MORRIS: Your Honor, the sentence that we're
11:20:30 14 suggesting the Court assess in this case is 120 months.

11:20:34 15 THE COURT: Mr. Morris, anything further at this
11:20:36 16 time? You'll be given another opportunity to speak, as will
11:20:40 17 Mr. Diehl. Do either of you have anything else right at this
11:20:42 18 time?

11:20:43 19 MR. MORRIS: No, Your Honor.

11:20:43 20 THE COURT: Mr. Diehl?

11:20:44 21 THE DEFENDANT: No, sir.

11:20:46 22 THE COURT: Mr. Devlin, does the government have
11:20:49 23 anything the government would like to say before the Court
11:20:51 24 accesses sentence?

11:20:53 25 MR. DEVLIN: Yes, I do, Your Honor. Judge, this day

11:21:01 1 must be a day of reckoning for David Andrew Diehl. After ten
11:21:06 2 years, justice has finally caught up with this child molester.
11:21:11 3 Justice here warrants a long and harsh prison sentence to
11:21:16 4 ensure that he never ever again harms another child, to ensure
11:21:23 5 the safety of the community, and most of all, to punish this
11:21:29 6 remorseless child rapist for his sexual assault of innocent,
11:21:33 7 defenseless children.

11:21:36 8 This man is nothing but an opportunist, Judge. He's
11:21:41 9 an opportunistic liar. Nothing that he says can be given any
11:21:45 10 credence. He's an opportunistic manipulator. He's an
11:21:50 11 opportunistic minimizer of his conduct, and he's an
11:21:54 12 opportunistic child molester. There is absolutely nothing
11:21:58 13 redeeming about him or about any of his videos. And I -- and I
11:22:06 14 object to Mr. Morris's minimization of the horrific nature of
11:22:12 15 those videos by saying, well, he didn't have intercourse.
11:22:15 16 Honestly, Judge, you saw the videos. That's not true.

11:22:22 17 I hope that the Court keeps in mind that every single
11:22:26 18 video of child pornography charged and introduced in this case
11:22:32 19 represents and depicts the defendant committing a sexual
11:22:36 20 assault of a child for which he's not been tried or convicted
11:22:41 21 yet. And not all production of child pornography necessarily
11:22:48 22 involves a sexual assault, Judge, under the law. But in this
11:22:51 23 case it does. And frankly, Judge, in my opinion, this is the
11:22:55 24 tip of the iceberg.

11:22:57 25 There's an encrypted hard drive out there. This

11:23:01 1 bogus story about losing his password and not remembering it is
11:23:07 2 nothing but a blatant, flat lie. You heard the evidence from
11:23:13 3 Mr. Courtney -- and I'm not going to stand here today and say
11:23:16 4 Mr. Courtney is a pillar of the community by any stretch of the
11:23:21 5 imagination. But Mr. Courtney is of the quality of person that
11:23:24 6 this child molester that is before you today decided to
11:23:27 7 associate himself with, another collector of child pornography.

11:23:31 8 And Mr. Courtney indicated that Mr. -- Mr. Diehl was
11:23:34 9 a meticulous organizer of child pornography. He had it on his
11:23:40 10 encrypted hard drive, according to the testimony of
11:23:43 11 Mr. Courtney, and he had it very well organized, as many child
11:23:49 12 pornography collectors and molesters do. So to say that he has
11:23:54 13 suddenly lost or his landlord took his password, it's just
11:24:00 14 absolutely beyond imagination.

11:24:02 15 But, nevertheless, what we have today, Judge, one of
11:24:06 16 the key things I want to focus on is what he just said to you.
11:24:09 17 He's remorseless. He's entirely remorseless. He thinks that
11:24:14 18 this is basically a bad roofing job, and he's sorry for it, and
11:24:18 19 it will never happen again. He exercised a lack of judgment.
11:24:22 20 Oh, it was just one hour of video. I apologize for the breach
11:24:26 21 of trust. It doesn't reflect me before or after. He's going
11:24:29 22 to blame being at a nudist camp for his problems. That it was
11:24:34 23 somebody else's fault. It was the fault that I was running
11:24:37 24 around all these naked people and I guess children; and,
11:24:40 25 therefore, that drove me to do this.

11:24:44 1 And as I've already addressed, he tries to claim he's
11:24:47 2 a devoted father, but he's subjected his son to having to
11:24:50 3 testify in this Court, to have to sit on that witness stand,
11:24:53 4 Judge, for his own selfish gain. There is nothing redeeming
11:24:59 5 about this defendant.

11:25:00 6 To say that the length of time that's transpired here
11:25:04 7 is something that ought to benefit him. Absolutely nothing has
11:25:08 8 happened in that length of time to not only punish the
11:25:12 9 defendant but to get him to overcome what his problems are.
11:25:15 10 Note how Mr. Morris and the defendant both talked to you about
11:25:19 11 what's happened in those intervening years, that there's no
11:25:23 12 evidence of anything happening, that there's been nothing
11:25:26 13 introduced to show that he's engaged in this.

11:25:30 14 There is no statement that he can make truthfully --
11:25:33 15 that either one of them can make truthfully that he didn't do
11:25:38 16 anything constituting a sexual assault between then and now,
11:25:40 17 because he can't say that. And when we get that hard drive
11:25:44 18 decrypted, Judge, some day, justice will come around again.

11:25:48 19 These offenses were especially cruel and degrading.
11:25:52 20 They were cruel and degrading not only because they were
11:25:56 21 recorded and because they had -- they involved minor,
11:25:58 22 defenseless children, but because they were then disseminated
11:26:03 23 on the Internet where they have turned up so far in hundreds of
11:26:07 24 cases, as indicated by the testimony you received.

11:26:11 25 This is a -- these are going to be on the Internet

11:26:15 1 forever. There's no way to put a cap on these things again and
11:26:21 2 take them off. They are going to be out there forever.
11:26:24 3 They're going to be haunting all of these victims and their
11:26:27 4 families forever.

11:26:29 5 It's not often that this Court has a producer of
11:26:32 6 child pornography in front of it. Most of your cases, Judge,
11:26:36 7 are possessors and distributors of other child pornography.
11:26:41 8 Now you have in front of you someone who has actually made it,
11:26:45 9 and who has actually produced it. And he's produced it with
11:26:49 10 the intent, as Mr. Courtney stated in his testimony, of getting
11:26:53 11 others to produce it and give it to the defendant.

11:26:55 12 This child pornography has a value in the child
11:26:59 13 pornography community, unfortunately. There's regular child
11:27:03 14 pornography, and then there is new and fresh child pornography.
11:27:06 15 That's what the defendant was. He was kind at the top level on
11:27:10 16 the child pornography chain. He was making it and giving it to
11:27:14 17 others with the hope of getting equally desirable child
11:27:18 18 pornography that was new and fresh. That's what Mr. Courtney
11:27:25 19 testified to, and there's every reason to believe that's the
11:27:28 20 case.

11:27:29 21 The defendant has been surreptitiously filming people
11:27:33 22 for years, as indicated by us in our sentencing memorandum and
11:27:35 23 indicated by the evidence. A girl he was going out with when
11:27:38 24 he was 28 years old and she was 15 was surreptitiously
11:27:43 25 interviewed -- excuse me -- video-ed having sex with him. You

11:27:48 1 had the hidden camera evidence that was presented in this
11:27:52 2 trial. He's done this over and over again for now over 20
11:27:56 3 years.

11:27:57 4 We don't know yet what else he's done. I'm sure that
11:28:01 5 we will one day find out. But the bottom line is, Judge, that
11:28:07 6 this is this Court's opportunity to send a strong message to
11:28:13 7 send an flaying unflaggingly strong message to this defendant
11:28:18 8 and to anyone else like him that this society will not tolerate
11:28:21 9 this kind of conduct. He's not even being punished here today
11:28:25 10 for the underlying sexual assaults, the underlying rapes, the
11:28:30 11 underlying sexual abuse of the children. I'm hoping that that
11:28:34 12 justice will come from the state, where it has to come from.
11:28:38 13 He's only being sentenced today for videotaping it, for
11:28:41 14 producing it, and for enticing children -- well, he didn't even
11:28:46 15 entice. They didn't know in most of the instances that they
11:28:48 16 were even being filmed.

11:28:50 17 And now he wants you to -- to make believe that he
11:28:54 18 was a good man and that this was only an hour of his life.
11:28:58 19 He's minimized this the whole time. He's minimized this from
11:29:02 20 the very beginning. This is no big deal to him. And he hasn't
11:29:07 21 even -- he's never apologized to the victims. He doesn't feel
11:29:12 22 bad about having raped these young children.

11:29:17 23 I've been trying to think of a reason, any reason
11:29:20 24 whatsoever, to recommend to this Court something less than life
11:29:26 25 imprisonment and I can't come up with anything. I can't come

11:29:30 1 up with a single reasonable recommendation less than life.
11:29:36 2 But, of course, I realize life is not an authorized punishment
11:29:40 3 here. But what effectively amounts to his life is an
11:29:43 4 authorized punishment.

11:29:46 5 And to do anything less than putting this defendant
11:29:51 6 away for what amounts to the rest of his life is going to be
11:29:57 7 not doing justice to the victims in this case. It's not going
11:30:01 8 to be doing justice to the children of this society, who
11:30:08 9 only -- so far there have been four who have been found.
11:30:12 10 There's more out there, undoubtedly. We don't have the
11:30:14 11 evidence of it at this point, but we will find it. The FBI has
11:30:20 12 done an amazing job in this case tracking down this defendant
11:30:23 13 and proving this case. This is one of the strongest cases
11:30:28 14 evidentiary wise that I've ever been involved in in all my
11:30:32 15 years as prosecutor. This was airtight as far as I'm
11:30:37 16 concerned.

11:30:38 17 I hope that this Court has the courage to impose a
11:30:44 18 harsh sentence in this case. And what will that be? I'm going
11:30:48 19 to go out on a limb here. I hate to even put out a number,
11:30:53 20 because it might be less than what the Court is thinking but I
11:30:55 21 hope it isn't. I hope the Court imposes nothing less than a
11:30:58 22 total punishment of 60 years. We'd like to see more. Again, I
11:31:04 23 think 200 years is probably not enough in this case.

11:31:09 24 But keep in mind, Judge, that of all the possession
11:31:13 25 cases and the receipt cases that you sentenced, the lightest

11:31:17 1 one that I'm aware of in my own experience with you is about
11:31:21 2 four years for possessor, but they go up to 15 or 20 years.

11:31:25 3 That's for people who don't make this kind of horrific trash.

11:31:31 4 This defendant has produced this. This defendant has
11:31:37 5 shown you evidence of his own rape of children and has
11:31:42 6 disseminated that to others on the Internet. He deserves
11:31:47 7 substantially more than 20 years that possessors and people who
11:31:53 8 receive and distribute this stuff kind of generically get.

11:31:57 9 He just deserves at least 60 years. Seventy-five to
11:32:03 10 100 years would be more appropriate under the circumstances.
11:32:11 11 This has got to send a strong message that this simply is going
11:32:15 12 to be punished harshly and anybody who engages in this type of
11:32:19 13 behavior is going to essentially face the rest of their lives
11:32:22 14 in prison.

11:32:23 15 The victims have to be kept in mind here. There has
11:32:26 16 been no consideration of the victims by the defendant. The
11:32:29 17 victims are going to be living with this for the rest of their
11:32:32 18 lives. And, again, the more that comes out, the more
11:32:36 19 disturbing it is. There's nothing good that's coming out of
11:32:39 20 this case as new evidence is produced.

11:32:41 21 So I ask that you consider a sentence that
11:32:46 22 effectively amounts to the defendant's life. That's going to
11:32:49 23 require that you stack -- stack counts, stack sentences. The
11:32:55 24 defendant is fifty -- he's going -- he's 49 years old. He's
11:33:00 25 going to be 50 years old next year. That's why I suggested a

11:33:04 1 minimum -- again, I'm not asking for 60. I would like to see
11:33:06 2 more. But at least 60 to do justice in this case.

11:33:10 3 Please, Judge, I ask that you -- that you do justice
11:33:14 4 in this case, that your sentence serve justice, and that this
11:33:18 5 defendant never see anything but the inside of a prison again
11:33:23 6 during his natural life.

11:33:26 7 THE COURT: Does Probation have anything further
11:33:29 8 before sentence is pronounced?

11:33:30 9 PROBATION OFFICER: No, Your Honor.

11:33:31 10 THE COURT: Is there anyone here present in the
11:33:33 11 courtroom, anyone in the audience, who desires to speak with
11:33:36 12 regard to this case before the Court pronounces sentence? If
11:33:40 13 so please, come forward at this time and I will hear from you.
11:33:44 14 And if there is more than one person who desires to speak, if
11:33:48 15 that person will come to the podium, and anyone else who wants
11:33:51 16 to speak, line up there at the rail where the marshal is so we
11:33:54 17 can move through expeditiously.

11:33:58 18 MR. MORRIS: Your Honor, for the record, I'd like to
11:34:00 19 interpose an objection at this point, that it is a due process
11:34:03 20 violation for the Court to here statements as the Court is
11:34:08 21 about to hear. We have no way of cross-examining and no way to
11:34:14 22 test the veracity of the statements, and we'd ask the Court not
11:34:18 23 allow this.

11:34:19 24 THE COURT: Okay. The objection will be overruled.
11:34:22 25 The Court will hear from members of the public with regard to

11:34:25 1 this case. The weight that the Court will give such testimony
11:34:31 2 remains to be seen or whether the Court will consider it at
11:34:34 3 all. But I am going to allow the statements. Please come
11:34:37 4 forward, whoever desires to speak first.

11:34:47 5 Would you state your name, and then you may proceed.

11:34:49 6 MR. BRIGHAM: May name is James Edward Brigham.

11:34:52 7 Your Honor, first I'd like to read a statement that
11:34:56 8 my daughter wrote this morning. I -- me and my wife just went
11:35:07 9 through the death of her father and just returned home last
11:35:12 10 night from England. I got up at 3 o'clock in the morning
11:35:17 11 knowing that I was going to be here in court. And when I woke
11:35:21 12 up, my daughter was already awake because she couldn't sleep.
11:35:25 13 And so we sat and talked for a while. She said, Dad, I don't
11:35:29 14 know what to say. I'm -- I'm scared of this guy, and I don't
11:35:33 15 know what to say. And I said, Well, maybe it's best that you
11:35:36 16 write it down. You can -- your thoughts will probably be a
11:35:40 17 little bit clearer.

11:35:41 18 So this is from my daughter, S.B.:

11:35:45 19 To the Court: I was seven years old. Young, happy,
11:35:50 20 active, loved everything life had given me, and enjoyed my
11:35:56 21 friends. Not only that, but my parents love for my well-being
11:36:00 22 and health. I loved my life as a child, which is now a blur in
11:36:05 23 my life. I don't recall being a happy young girl that I'm told
11:36:10 24 I was today.

11:36:11 25 I remember the hell I was put through you,

11:36:14 1 David *Dial*, and the threats told to myself and of my family.
11:36:20 2 The flashbacks of like movies, just as the nightmares I have
11:36:25 3 which won't ever go away. My life simply turned to the person
11:36:30 4 I once was and the only person I remember being. I picked up
11:36:34 5 drugs as young as 11 years old, fifth grade. Fourteen years
11:36:40 6 old started using Xanax. First year of high school, I enjoyed
11:36:45 7 being under the influence of alcohol, xanax, and marijuana.
11:36:49 8 High school went on. I was using cocaine, ecstasy, marijuana,
11:36:53 9 Xanax, and large amounts of alcohol.

11:36:55 10 When I wasn't using, I was angry with everything in
11:36:58 11 life. I despised anybody and everybody who would help or try
11:37:01 12 to talk to me. Verbally assaulting my parents too many times
11:37:04 13 to even count. I was diagnosed with anorexia when I was 15
11:37:09 14 years old and weighed 85 pounds. Suffering flashbacks and
11:37:13 15 nightmares every day and night since I was seven years old.

11:37:19 16 It was hard, but I never knew it would have to have
11:37:22 17 gotten so terrifying to deal with life. I had no idea I had
11:37:26 18 and eating disorder until the day I was told. I was three days
11:37:30 19 away from death in a doctor's office with my mother,
11:37:34 20 Janet Brigham. I was appointed to Vita Treatment Center in
11:37:37 21 California three days after being diagnosed.

11:37:39 22 I got to the point where I hated the texture of water
11:37:44 23 and food. I had only been using drugs. Again she states, even
11:37:48 24 water I couldn't drink. Three days from death, I was being
11:37:52 25 forced to drink water.

11:37:54 1 We were told by the doctor that you've got to get
11:37:56 2 fluids in her or her heart is going to stop.

11:37:59 3 I couldn't thank the treatment team more who
11:38:04 4 worked -- who had worked with my family and I to discover all
11:38:08 5 I'd been through and what I've been suffering for years. Once
11:38:12 6 I was out of treatment, I had to come back to Austin, Texas,
11:38:17 7 where I was limited to what I could and could not do. I
11:38:21 8 quickly relapsed on the drugs I had been using before the
11:38:25 9 months in treatment. My anger was out of control, just as the
11:38:29 10 life I was living.

11:38:31 11 I assaulted my parents twice leading to spending time
11:38:35 12 in juvenile. The anger I had against my parents was from
11:38:40 13 myself not knowing why my parents did not know what
11:38:43 14 David *Dial* had done to myself.

11:38:47 15 I started uses heroin every now and then in my
11:38:56 16 relapse with drugs I had been using before treatment. Using
11:38:59 17 drugs didn't help numb myself from life anymore. On February
11:39:07 18 18th, 2010, I overdosed on 80 pills of Zyprexa, also Trazodone,
11:39:17 19 my sleeping medication. I was in a coma for four days, and the
11:39:22 20 first thing I said to my parents when I woke up was, Why didn't
11:39:29 21 you let me die? I didn't want my life anymore. I wanted to be
11:39:36 22 dead.

11:39:36 23 I had no confidence of anything. I was soon admitted
11:39:39 24 to Meridell Achievement Center, who helped change the person I
11:39:44 25 was into the person I am now. I still have fears of David *Dial*

11:39:52 1 coming back and hurting my family and myself. But the years
11:39:56 2 he's serving he deserves to the fullest.

11:40:01 3 And this is to you David: I hope you hate being
11:40:04 4 known as a sexual predator you are known as today. I am now 18
11:40:10 5 years old. I have a life and friends who I love. I love my
11:40:14 6 parents more than I could ever show to them. I have overcome
11:40:19 7 using drugs, and I've now been clean the longest in my life
11:40:24 8 since I have started using. I am so happy with who I am, and I
11:40:28 9 wont forget the people who have helped me come this far in my
11:40:33 10 life. I never knew I would live to be 18 years old with a
11:40:40 11 future that I have.

11:40:41 12 Last part of this she says: Special thanks to my
11:40:50 13 FBI Agents, Jake and Sean, as well as Detective Mofflin from
11:40:56 14 Williamson County for putting David where he belongs.

11:41:01 15 The next statement, it's from a friend of ours who
11:41:12 16 underwent abuse as a child and is a close family friend. Dear
11:41:20 17 Judge -- this is from a woman named Gina Massengill:

11:41:23 18 Dear Judge, I'm writing to you because I'm a close
11:41:25 19 friend of the Brigham family. S. is very dear to me. I'm also
11:41:30 20 writing because I'm a survivor of a child molester, my
11:41:33 21 stepfather, that not only stole my innocence from me when I was
11:41:37 22 12 but also a large part of the reason my blood sister, Shelly,
11:41:40 23 one year younger than me, took her life by hanging herself at
11:41:45 24 Mount Bonnell three and a half years ago. She was 45 years
11:41:48 25 old.

11:41:50 1 Luckily, I was blessed with a loving husband and
11:41:53 2 children that I feel have been a wonderful reason and
11:41:56 3 distraction to live through that pain. Shelly was not as
11:42:00 4 fortunate. She was never able to be as an adult woman to have
11:42:05 5 a relationship where she could trust a man and let herself be
11:42:08 6 in love with someone. Shelly asked me about a year before she
11:42:12 7 killed herself to go with her to confront that long-ago
11:42:15 8 situation. I would not. In my mind I could not bear to give
11:42:21 9 him any more of myself than he had already taken. Oh, how I
11:42:24 10 would change that answer if given another chance.

11:42:26 11 Shelly and I were both abused by him during the
11:42:29 12 same -- during the same time. We both moved out of the house
11:42:33 13 at a young age. I was 16 the first time I got married.
11:42:37 14 Ridiculous, I know, but to me that was better than my situation
11:42:40 15 in the house with him.

11:42:41 16 I was lucky enough to eventually meet my husband of
11:42:46 17 22 years, and have had a relatively normal though sometimes
11:42:50 18 difficult life. Shelly had a life of drugs and bad choices.
11:42:56 19 When she finally stopped the drugs, life still seemed so hard
11:43:00 20 for her to manage well. The crazy thing about these men is
11:43:05 21 they somehow convince you to keep it quiet. At least when it
11:43:08 22 happened to me, it was not talked about.

11:43:11 23 That is why I'm so proud of S. She's choosing to
11:43:16 24 speak up and make this pervert pay for what he did. Although
11:43:20 25 it's taken its toll on her, I hope she will continue on the

11:43:24 1 decent path she is on today. I think it would be easier to do
11:43:28 2 this knowing your abuser is behind bars.

11:43:32 3 From a brokenhearted woman that in some ways will
11:43:40 4 never get over what a pervert did to my life, Gina Massengill,
11:43:45 5 Austin, Texas.

11:43:49 6 This last statement is from me, Your Honor. And also
11:43:55 7 directed it to you, David *Dial*, especially to you.

11:43:58 8 THE DEFENDANT: It's *Deal*.

11:43:59 9 THE COURT: Do not direct anything to the defendant.
11:44:03 10 If you have anything you want to say --

11:44:04 11 MR. BRIGHAM: I can't begin to express the pain you
11:44:09 12 put my daughter and family through. You robbed us of being
11:44:11 13 able to watch our daughter Sarah from growing from a happy
11:44:15 14 little girl who was thrilled with what every day will bring.

11:44:18 15 You will never know or understand what it is like to
11:44:21 16 have watched your daughter emaciated from an eating disorder to
11:44:25 17 the point of death, nor the horror of watching a machine
11:44:28 18 breathe life into her for four days when she tried to end the
11:44:32 19 pain inflicted by you, David.

11:44:38 20 When I look at you sitting there in chains, I know
11:44:40 21 what pure evil looks like. And the thought of you dying in
11:44:45 22 prison should bring some sort of closure, but it doesn't. My
11:44:50 23 wife and I will never be able to take away from Sarah what you
11:44:53 24 did to her. What kind of person would tell a little girl at
11:45:00 25 the point of a gun that if she ever told on you, that you would

11:45:04 1 kill her family as well as her? Only an animal in human form
11:45:09 2 could do such a thing.

11:45:12 3 You got up here and said how much you loved your son,
11:45:17 4 but you used your own son, A., as bait to lure my child to your
11:45:22 5 house when you started molesting her at age seven. She spent
11:45:26 6 the next ten years protecting us from you by keeping what you
11:45:31 7 had done to her inside where it slowly ate her away to the
11:45:35 8 point where she tried to kill herself and end the pain.

11:45:39 9 I remember racing to the emergency room with Sarah
11:45:42 10 after finding her on the floor in the bathroom in convulsions.
11:45:48 11 I remember the nurse telling us that there were no antidotes
11:45:52 12 for the drugs she had taken and that there was a strong chance
11:45:55 13 she would not survive.

11:45:56 14 I pray that every day that you spend behind bars that
11:46:01 15 you suffer horribly, and I truly, truly look forward to the day
11:46:06 16 that I receive news of your death.

11:46:10 17 That's all I have to say, Your Honor.

11:46:20 18 MR. MORRIS: Your Honor may I pose an objection at
11:46:22 19 this point?

11:46:23 20 THE COURT: Pardon me?

11:46:23 21 MR. MORRIS: May I impose an additional objection at
11:46:26 22 this point?

11:46:26 23 THE COURT: Yes.

11:46:27 24 MR. MORRIS: The nature of what the Court has heard
11:46:29 25 is as we described it would be in the chambers hearing. We

11:46:32 1 have no base -- no materials with which to rebut this and no
11:46:38 2 procedure to rebut it. It fundamentally violates due process
11:46:42 3 for this type of information about an alleged victim who is not
11:46:46 4 a part of this matter and not a part of the trial to be given
11:46:51 5 before sentencing.

11:46:51 6 We ask that the Court recess this sentencing, order
11:46:55 7 additional discovery with respect to this allegation, and allow
11:47:01 8 us to come in and rebut.

11:47:03 9 THE COURT: The objection is overruled. Court will
11:47:05 10 proceed. Come forward.

11:47:20 11 MS. TOLSON: I am the mother of --

11:47:22 12 THE COURT: Would you state your name, please.

11:47:24 13 MS. TOLSON: Neva Tolson

11:47:28 14 I really don't know what to say, except as far as a
11:47:39 15 victim statement. On August 21st I was presented with two FBI
11:47:47 16 agents at my door after coming home from the grocery store with
11:47:52 17 my little one. And things were great. I actually was getting
11:47:57 18 over being upset about my job, and life was actually going good
11:48:02 19 and then I get this.

11:48:07 20 Basically, I felt a part of my soul die, and I could
11:48:16 21 consider him a murderer because of this. And it's not just
11:48:19 22 pieces of my soul I know that he damaged, everybody else that
11:48:21 23 he's touched in peripheral.

11:48:30 24 After learning this, I have to deal with sudden bouts
11:48:36 25 of inconsolability. I did turn to alcohol, and I'm just now

11:48:44 1 finally starting to move past it and fix it. But that was over
11:48:52 2 a year ago, and I'm just now starting. He took something that
11:48:59 3 I held sacred and beautiful between a loving couple, and so our
11:49:07 4 marriage is strained with my husband and I because of this. He
11:49:11 5 turned it into something that was ugly and foul. He is the
11:49:17 6 very example that allows others to so publicly disparage
11:49:23 7 against something that should be joyful in every beings'
11:49:28 8 hearts.

11:49:29 9 He's put a giant "F" on my forehead. It's just I
11:49:35 10 failed my child. I have been put on even more constant vigil
11:49:46 11 even though I thought I did good, and I still ended up failing
11:49:51 12 her and the worse still happened.

11:49:55 13 Trust in anyone new that I meet is very difficult.
11:50:03 14 Trust for anyone that my little one meets is very difficult for
11:50:07 15 me to get past. I scan everybody. Who knew that a family man
11:50:11 16 with a two-year-old son and a wife could just be so evil.
11:50:26 17 It's -- her world got killed. My world got killed. My
11:50:30 18 family's world got killed. And I -- and that's basically it.

11:50:39 19 Thank you, Your Honor.

11:50:40 20 THE COURT: Thank you.

11:50:41 21 Anyone else in the audience who desires to speak?

11:50:48 22 (No response)

11:50:48 23 THE COURT: Mr. Diehl, Mr. Morris, please come back
11:50:51 24 forward. Do either or both of you have anything you would like
11:50:56 25 to say, either in addition to what you've already said or in

11:51:00 1 response to anything that has been said by anyone else?

11:51:03 2 MR. MORRIS: First of all, Your Honor, I again assert
11:51:07 3 my objection to the first speaker and ask that the Court not
11:51:10 4 consider what he said for any purpose in this sentencing and
11:51:14 5 specifically his statements by people who were -- or being read
11:51:19 6 by people who are not here in Court.

11:51:22 7 As I pointed out, this -- that information relates to
11:51:25 8 someone who is not technically a victim in this offense. That
11:51:30 9 set of circumstances will be dealt with by the appropriate
11:51:33 10 authorities, but it's not appropriate to influence the
11:51:36 11 sentencing in this Court.

11:51:40 12 THE COURT: Well, the Court overrules the objection.
11:51:42 13 But after the Court studies what the Court has in front of it,
11:51:45 14 the Court will determine what the Court is going to consider
11:51:48 15 and is not going to consider in imposing sentence in this case
11:51:54 16 and will so advise you on the record.

11:51:56 17 MR. MORRIS: And brief rebuttal to something that the
11:51:59 18 government said or all that the government said, I would
11:52:03 19 submit: The overriding mandate of 18 USC 3553 is that the
11:52:11 20 Court's will impose a sentence sufficient but not greater than
11:52:17 21 necessary to comply with the purposes set forth in this text.

11:52:20 22 The considerations of 3553 nowhere contain
11:52:26 23 vengeance. Nowhere do they contain a statement that someone is
11:52:31 24 to be made an example of. Deterrence, yes, but not an example
11:52:37 25 of. Nowhere does it state in those considerations that you're

11:52:41 1 to do something so -- for the benefit of a victim to vindicate
11:52:47 2 them as far as vengeance.

11:52:49 3 Mr. Devlin challenges you to have the courage to --
11:52:54 4 to give an unreasonable sentence. It's not a matter of
11:53:00 5 courage. It's a matter of judicial wisdom and following the
11:53:06 6 law. What 3553 mandates is, as I said, that that is necessary,
11:53:10 7 but not more than.

11:53:12 8 Mr. Diehl is 50 years old. The Court has a wide
11:53:18 9 discretionary range of sentence it can impose. But the
11:53:21 10 guidelines in this case aren't as outrageous as the government
11:53:30 11 urges the Court to assess.

11:53:31 12 If you were to assess the bottom of the guideline
11:53:33 13 range, Mr. Diehl would be in his late 60s when he gets out. As
11:53:39 14 the Court knows, the likelihood of recidivism diminishes as
11:53:44 15 someone gets older. The likelihood of recidivism is low in any
11:53:48 16 events, about 14 percent. But it gets lower with age. I ask
11:53:52 17 the Court to consider the guidelines, consider what we've had,
11:53:56 18 but not be persuaded to react in such a way that is not in
11:54:01 19 keeping with the mandate of 3553.

11:54:07 20 THE COURT: Mr. Diehl, do you have anything further
11:54:09 21 you would like to say?

11:54:10 22 THE DEFENDANT: Yes, sir, I do.

11:54:11 23 I'm here to take responsibility for my actions, and I
11:54:16 24 have. I stipulated to the things that I've done. With regard
11:54:21 25 to Kenneth Courtney, he never saw any child pornography on my

11:54:26 1 computers. Nobody ever has. I never collected it. He got
11:54:30 2 five years off his sentence for coming here and saying what he
11:54:33 3 did. That's -- that's the first thing.

11:54:36 4 When I discovered that he had child pornography, I
11:54:40 5 terminated my relationship with him. You saw the E-mail with
11:54:43 6 regard to that. I don't collect it, I don't trade it, and
11:54:49 7 nobody's ever said I did other than him, ever. And lots of
11:54:52 8 people that I have long-term relationships with, that I've
11:54:57 9 known for 20 years, 30 years the FBI has talked to. And nobody
11:55:04 10 else has ever said anything except the person that was getting
11:55:08 11 a sentence benefit from it.

11:55:09 12 I had the night that he came over, the only time he's
11:55:12 13 ever been over to my house. My sister was there. My
11:55:15 14 girlfriend was there. My son was there. He was there for 20
11:55:18 15 minutes, and he left. My relationship with him was consulting
11:55:22 16 and software. That's the relationship I had with
11:55:26 17 Mr. Courtney. And, again, you have the -- the E-mail of what
11:55:30 18 action I took when I discovered what he was doing.

11:55:33 19 And I gave him advice. I said, you know, you're
11:55:37 20 going to get in serious trouble if you continue that. He was
11:55:40 21 on meth. He was on steroids. He had a daughter. I gave him
11:55:45 22 the best advice I can, and that was the end of our relationship
11:55:49 23 for the most part. So I wanted to say that.

11:55:52 24 Second of all, J.D. 3's mother just spoke, and I
11:56:01 25 sincerely apologize for the 20 minutes of video that were made

11:56:05 1 with your daughter. I'm sorry I've affected your life. Mine's
11:56:11 2 been destroyed. My son's been taken from me. The rest of my
11:56:16 3 life will be affected and -- but aside from that, I sincerely
11:56:22 4 am sorry. I have violated your trust. Mine was violated as a
11:56:26 5 child. I was raped. But I got over it.

11:56:33 6 And the last thing I would say is to the Brighams.
11:56:38 7 The last time I saw S. and you before we left Austin, Sarah was
11:56:45 8 a perfectly happy little girl. Never expressed any concern
11:56:51 9 about me or fear from me when I took my son, her, and your son
11:56:56 10 to the fair here in Bastrop. And I dropped her off, and then
11:57:01 11 we moved away and left.

11:57:05 12 I don't know what happened in your lives. But I
11:57:08 13 never, ever, threatened S. in any way, shape or form. I don't
11:57:14 14 even know that I owned a gun. If I did, it would have been a
11:57:16 15 BB gun.

11:57:18 16 MR. BRIGHAM: You're a goddamn liar.

11:57:18 17 THE DEFENDANT: But the major thing with that is that
11:57:23 18 in 2007, when I was working in Dallas, I stopped by your
11:57:26 19 house. I came there, and everything was fine. You welcomed
11:57:30 20 me. It was a happy 20 minutes or whatever we talked. And then
11:57:34 21 I went on my way to see Kerry where A. was. But if I had
11:57:43 22 threatened your family in any way, I wouldn't be stopping by
11:57:48 23 seven years later to say hello.

11:57:51 24 And I never threatened her, and I don't know what the
11:57:54 25 problems are or how this has come about where she, you know,

11:57:59 1 got addicted to drugs or whatever. But it's not me, and you're
11:58:04 2 going to have to keep searching. She's not a part of these
11:58:08 3 charges. She was never abused by me. And absolutely I have
11:58:12 4 never threatened anybody, any kid. It's not part of my
11:58:17 5 personality. I didn't do it. And I'm really sorry that you
11:58:22 6 have used this platform to try to solve your family's problems,
11:58:27 7 but I didn't do it. And that's all I can say, Your Honor.

11:58:32 8 THE COURT: Mr. Morris, anything further?

11:58:34 9 MR. MORRIS: No, Your Honor.

11:58:36 10 THE COURT: Mr. Diehl, anything further?

11:58:37 11 THE DEFENDANT: No, Your Honor.

11:58:38 12 THE COURT: The Court at this time is going to recess
11:58:43 13 while I study what has been presented to me here today and give
11:58:49 14 some thought to this. We will be in recess until 2 o'clock.
11:58:53 15 And at 2 o'clock the Court will wrap up this hearing by
11:58:57 16 imposing sentence at that time. I do want to look through
11:59:02 17 everything that has been presented before I do that.

11:59:06 18 So at this time, the Court's in recess until
11:59:08 19 2 o'clock. Mr. Devlin?

11:59:09 20 MR. DEVLIN: Judge, may I make just one comment? I
11:59:11 21 just want to say I did not address the defendant's supplemental
11:59:16 22 sentencing memorandum, and I didn't feel it was necessary. I
11:59:17 23 don't want the Court to take that as any concurrence in
11:59:20 24 anything that's being said there because, frankly, a lot of it
11:59:23 25 is quite misleading.

11:59:24 1 THE COURT: Unless the government specifically
11:59:27 2 states -- this is true in any sentencing hearing I conduct --
11:59:31 3 that it agrees with the position taken by the defense or unless
11:59:37 4 the defense says specifically the defense agrees with the
11:59:41 5 position taken by the government, I never infer that there is
11:59:47 6 concurrence on that, Mr. Devlin.

11:59:49 7 MR. DEVLIN: Thank you.

11:59:50 8 THE COURT: So my presumption is that the government
11:59:53 9 disagrees with what has been presented by the defendant, and
11:59:56 10 the defendant disagrees with what has been presented by the
11:59:59 11 government.

11:59:59 12 MR. DEVLIN: Thank you, Your Honor.

12:00:00 13 THE COURT: All right. At this time, the Court's in
12:00:02 14 recess until 2 o'clock.

12:00:04 15 (Recess)

14:02:51 16 THE COURT: The Court having conducted a sentencing
14:02:58 17 hearing this morning in the case of *United States of America v.*
14:03:04 18 *David Andrew Diehl* now completes that portion. I heard
14:03:10 19 everything and accepted everything that I was going to consider
14:03:18 20 this morning and then recessed in order to have some time to
14:03:23 21 collect my thoughts and, again, think through what had been
14:03:29 22 presented to me.

14:03:30 23 Will the defendant and his lawyer please come back up
14:03:36 24 to the podium. Initially, let me observe that this case has
14:03:45 25 been well-lawyered on both sides. The government should be

14:03:50 1 pleased with the quality of the -- the representation that it
14:03:55 2 has received from the beginning in this case, and the defendant
14:04:01 3 should likewise be pleased. Previous counsel I think did
14:04:06 4 whatever he could do to raise every issue with this Court that
14:04:13 5 could have any arguable relevance to this case both at the
14:04:19 6 guilt or innocence phase and at the sentencing phase.

14:04:24 7 As everyone will recall, I had originally set this
14:04:28 8 case for sentencing on June the 15th of 2011 following the
14:04:35 9 trial that had been conducted on February 8th, 2011. That gap
14:04:42 10 of four months was longer than what I usually set for
14:04:46 11 sentencing hearings because I felt like there would be a lot of
14:04:50 12 information that I needed to review and wanted to give
14:04:54 13 defendant's counsel ample time to present anything they desired
14:04:59 14 to this Court.

14:05:01 15 We came on at that time for sentencing hearing, and
14:05:09 16 Mr. Diehl indicated that he had fired previous counsel and did
14:05:13 17 not want counsel to represent him, so I again delayed
14:05:18 18 sentencing in order that an attempt could be made to locate
14:05:24 19 counsel. And on July the 20th, 2011, we conducted another
14:05:29 20 hearing, at which time Mr. Morris was allowed to appear as
14:05:36 21 counsel for the defendant and his previous counsel was
14:05:41 22 discharged. And it was a result of that hearing that we set
14:05:46 23 sentencing, then, for today.

14:05:51 24 A few preliminary remarks on what the Court has had
14:05:54 25 in front of it, some of this from the time of the trial, some

14:05:59 1 of it more recently received. But I have carefully reviewed on
14:06:05 2 at least one occasion, and with regard to most of these
14:06:08 3 materials, more than one occasion, the items that I'm going to
14:06:18 4 mention here in a moment. In addition and perhaps most
14:06:21 5 importantly, I conducted a bench trial in this case, as we
14:06:26 6 said, in February of 2011. And I saw all of the evidence that
14:06:31 7 was presented against Mr. Diehl. I feel I have a very good
14:06:37 8 feel for this case and a very good knowledge of what has gone
14:06:41 9 on.

14:06:41 10 The items that I've carefully reviewed in
14:06:44 11 anticipation of sentencing are the presentence investigation
14:06:46 12 report, which was last revised on June the 8th, 2011. I accept
14:06:55 13 and adopt that report with the modifications that I made when
14:07:02 14 we had argument on the objections to the presentence
14:07:05 15 investigation report that were filed by the defendant.

14:07:10 16 I specifically find with regard to that report that
14:07:16 17 the correct total offense level in this case is 36, the correct
14:07:21 18 criminal history category is two, and the correct guideline
14:07:24 19 provisions would be a range of incarceration of between 210 and
14:07:30 20 262 months, a term of supervised release of three to five years
14:07:36 21 per count of conviction, a fine of \$20,000 to \$200,000 per
14:07:43 22 count of conviction, and a special assessment of \$1,000, being
14:07:49 23 \$100 per count of conviction and there being ten counts of
14:07:54 24 conviction in this case.

14:07:56 25 To the extent the Court considers a guideline

14:08:00 1 sentence, the Court will consider what I have just announced as
14:08:05 2 the proper guideline sentence.

14:08:08 3 I do note that this is a lengthy presentence
14:08:12 4 investigation report. Without taking into account the addenda
14:08:18 5 and the objections that are attached, it numbers 32 pages. It
14:08:24 6 is quite thorough. It contains a large amount of information,
14:08:28 7 all of which the Court has reviewed. As I indicated earlier,
14:08:34 8 when one is looking at these things, there are parts of lengthy
14:08:40 9 reports that are given more weight than other parts. So I
14:08:44 10 won't say that I have considered each part of the findings of
14:08:49 11 the Probation Department as being equal

14:08:54 12 I have reviewed the defendant's sentencing memorandum
14:08:57 13 filed June the 13th, 2011 by his previous counsel. I do note
14:09:03 14 that that requests a downward departure in the guidelines and a
14:09:07 15 sentence of 120 months. Attached to that -- that sentencing
14:09:13 16 memorandum is the report of Stephen A. Thorne, Ph.D., which
14:09:20 17 notes in that report on page 3 that Mr. Diehl is a moderate
14:09:27 18 risk to engage in sexually abusive, slash, violent behavior in
14:09:31 19 the near future.

14:09:34 20 Dr. Thomas goes on to say, That being said, it is
14:09:39 21 also important for the reader to be aware that an individual's
14:09:42 22 risk level varies with the degree to which his or her
14:09:46 23 personality, characteristics, and dimensions are exposed to
14:09:49 24 various environmental variables.

14:09:52 25 As such, if Mr. Diehl chooses to associate with

14:09:55 1 negative, parens, law-breaking, close paren, peers, if he
14:10:00 2 places himself in situations, slash, environments where he has
14:10:03 3 unsupervised access to young children, if he chooses to abuse
14:10:11 4 alcohols and, slash, or illicit parens, or prescription, close
14:10:16 5 parens, drugs in the future. And if he does not participate in
14:10:19 6 parens, and successfully complete, close parens an appropriate
14:10:24 7 sex offender treatment program, this examiner believes
14:10:26 8 Mrs. Diehl's risk for re-offending will increase.

14:10:31 9 I will come back to that, but that's something that I
14:10:35 10 have looked at carefully.

14:10:36 11 I've also reviewed the government's sentencing
14:10:39 12 memorandum, which was filed June the 13th, 2011, and note that
14:10:48 13 in that memorandum, the government points out examples of
14:10:53 14 sentencings in other cases the *Freeman* case of 50 years, the
14:10:58 15 *Huskey* case of 70 years, and the *Oehne* case of 45 years. I do
14:11:04 16 note that all of those cases involved one victim only, and here
14:11:09 17 there were three victims. And we do have a situation where I
14:11:14 18 am satisfied that this defendant uploaded images of the films
14:11:26 19 that he took, because I have no other explanation of how they
14:11:29 20 would have gotten in circulation had this defendant not
14:11:32 21 uploaded them. And that comes from the evidence that I heard
14:11:37 22 at the trial in this case.

14:11:39 23 In that original sentencing memorandum, the
14:11:42 24 government asks for a sentence in excess of 405 months. I
14:11:48 25 reviewed the defendant's response to that sentencing

14:11:51 1 memorandum.

14:11:54 2 Then I have reviewed carefully the defendant's
14:11:56 3 sentencing memorandum filed by his current counsel on October
14:12:01 4 the 19th, 2011 which points a number of cases where lower
14:12:10 5 sentences were assessed than those pointed out by the
14:12:12 6 government. And we heard those described here this morning,
14:12:18 7 and I paid careful attention to that, where the defense points
14:12:21 8 out that in a series of instances, lower sentences were
14:12:27 9 imposed.

14:12:30 10 And I have read the defendant's supplemental
14:12:33 11 sentencing memorandum which was filed on October the 21st,
14:12:38 12 2011. The most recent filings by the defendant continue to
14:12:43 13 urge this Court to depart downward to a statutory minimum of
14:12:47 14 ten years. I have also reviewed carefully the letter from the
14:12:52 15 defendant's father that was forwarded to me on October the
14:12:57 16 21st, 2011.

14:12:59 17 I have also seen the victim impact statement and
14:13:03 18 photographs received from Janet and Jim Brigham, and I heard
14:13:08 19 the statements that were presented and read by Mr. Brigham in
14:13:15 20 this courtroom this morning. All of those statements, both the
14:13:21 21 written victim impact statement and the oral statements this
14:13:26 22 morning were objected to by this defendant. And the defendant
14:13:31 23 has, of course, in my opinion, preserved his objection to that.

14:13:38 24 However, I have, I think, all of the information that
14:13:45 25 I need to reach an appropriate sentence based on the

14:13:50 1 presentence investigation report and the other documents that I
14:13:54 2 have previously related. And so I specifically do not consider
14:14:05 3 the statements by Mr. Brigham or the written victim impact
14:14:10 4 statement. I do note that the person referred to in that
14:14:15 5 statement is not a crime victim as defined for purposes of this
14:14:22 6 sentencing hearing, although it appears she was very much the
14:14:27 7 victim of a crime. But in order that there be no mistake about
14:14:31 8 it, I do not consider any of what I heard in that regard with
14:14:36 9 regard to this potential fourth victim in determining what I
14:14:40 10 think an appropriate sentence in this case would be.

14:14:43 11 In addition, while we discussed and argued the
14:14:48 12 objections that the defendant lodged to the presentence
14:14:51 13 investigation report, I heard the testimony of Special Agent
14:14:57 14 Sean Mullen, I reviewed the objections very carefully, I heard
14:15:02 15 the statements by both the government and the defendant with
14:15:06 16 regard to those objections, and I consider that part of the
14:15:10 17 record for purposes of considering what an appropriate sentence
14:15:16 18 would be also.

14:15:17 19 And, finally, I heard the statements that were made
14:15:23 20 in open court this morning by Ms. Tolson. Then I have heard
14:15:31 21 the argument by Mr. Morris, the attorney for the defendant, and
14:15:38 22 Mr. Devlin, and I have heard the defendant's statements.

14:15:46 23 Each of the parties, the government and the
14:15:48 24 defendant, argue that the Court go outside the guidelines in
14:15:53 25 this case. The government urges that this Court go above the

14:15:57 1 guidelines; the defendant urges the Court go below the
14:16:03 2 guidelines. Based on that and the argument of both parties,
14:16:07 3 the Court will not render a guideline sentence in this case.
14:16:11 4 Likewise, the Court will not consider an upward variance or a
14:16:16 5 downward variance from the guidelines as a guideline sentence.

14:16:21 6 The Court has stated the Court's opinion on what the
14:16:24 7 appropriate and correct guideline calculation and sentence will
14:16:28 8 be, but this Court will consider that as one of the factors, as
14:16:33 9 this Court is bound to do, under Title 18 of the United States
14:16:36 10 Code, Section 3553 and will in fact impose a sentence under
14:16:42 11 Title 18 of the United States Code, Section 3553 that the Court
14:16:47 12 determines is sufficient but not greater than necessary to
14:16:51 13 comply with the purposes set forth in that section.

14:16:56 14 In so doing, I want the record to be clear that after
14:17:00 15 carefully considering all of the items that I have mentioned,
14:17:05 16 that the sentence the Court will impose today is a sentence
14:17:09 17 that the Court finds reasonable and in compliance with the
14:17:14 18 precepts of Title 18 of the United States Code, Section 3553.

14:17:18 19 In determining the types of sentences available to
14:17:22 20 this Court, which is one of the factors in Section 3553, I
14:17:28 21 consider the full statutory range of punishment here of at
14:17:34 22 least 10 years but no more than 20 years per count. I consider
14:17:39 23 what I have found to be the correct guideline range of 210 to
14:17:43 24 262 months. I further have considered and carefully looked at
14:17:49 25 the guideline provision, if this Court were in error in

14:17:53 1 granting the two objections to the guidelines. So I have also
14:17:58 2 considered a total offense level of 40 and a criminal history
14:18:02 3 category of II, with a guideline range of 324 to 405 months.

14:18:08 4 And, finally, I have reviewed the presentence
14:18:16 5 investigation report and the scoring objections that were
14:18:19 6 denied, and there were four of them, to determine how that
14:18:25 7 would vary the guideline sentence, if I were in error in
14:18:30 8 denying the four remaining objections to the guidelines.

14:18:34 9 So, in my opinion, I have considered everything with
14:18:39 10 regard to an appropriate guideline sentence and every argument
14:18:44 11 by the defendant and the government in that regard and the
14:18:49 12 sentence that I will impose today is the sentence that I would
14:18:53 13 impose had we not ever had a discussion of the guidelines and
14:18:57 14 if we did not have the guidelines at all. But I have fully and
14:19:03 15 thoroughly considered all ramifications of the guidelines.

14:19:08 16 In determining then where a sentence should stand in
14:19:12 17 the range provided by in the statute of at least 10 years,
14:19:18 18 which is what the defendant argues for, but no more than 20
14:19:22 19 years per count and taking into account that the government
14:19:28 20 argues that a sentence of 60 years, or 720 months, would be an
14:19:37 21 appropriate sentence in this case, I am faced with a situation
14:19:47 22 where I must look at the individual factors in 3553, which I
14:19:55 23 have done carefully.

14:19:57 24 I have considered the nature and circumstances of
14:20:00 25 this offense and the history and characteristics of this

14:20:04 1 defendant. In examining the history and characteristics of
14:20:09 2 this defendant, I have paid particular attention to the letter
14:20:11 3 that I received from his father and I have additionally
14:20:15 4 considered the parts of the sentencing memorandum of the
14:20:19 5 defendant and the statements that were made by him about his
14:20:22 6 early childhood and background and the abuse that he had
14:20:26 7 suffered. And I also have considered his actions at and around
14:20:33 8 the time that appears the offenses were committed and his
14:20:37 9 actions afterward.

14:20:41 10 I must impose a sentence that reflects the
14:20:44 11 seriousness of the offense. And let me tell you, this is
14:20:49 12 probably the single most persuasive factor in this Court's
14:20:57 13 sentencing. I find this to be a horrible offense. I can find
14:21:04 14 no reasonable -- reasonable basis to think that someone who
14:21:09 15 abuses children of the ages ten, eight, and three at the time
14:21:15 16 and in the manner that was depicted on the video evidenced that
14:21:20 17 this Court saw can possibly think that it is anything but the
14:21:27 18 most serious of crimes.

14:21:30 19 This Court has seen what this Court considers serious
14:21:35 20 crimes in the past. The lawyers who appear in this Court
14:21:39 21 regularly have heard me speak about those crimes, but I would
14:21:44 22 rank the seriousness of this offense right at the top.

14:21:47 23 I stress that, because often when we get bogged down
14:21:50 24 in debates on application of the guidelines, it becomes almost
14:21:56 25 a technical evaluation of what should be asserted or whatnot or

14:22:02 1 where you take away, as we went through this morning for about
14:22:05 2 an hour and a half, two points here or two points there.

14:22:08 3 But when I am faced with a crime that I consider to
14:22:12 4 be this serious, I do not consider very much the technical
14:22:20 5 necessities of the guidelines other than to determine the
14:22:24 6 guideline sentence as I must, but I look more at the large
14:22:29 7 range of punishment that has been provided by the Congress of
14:22:33 8 the United States and the statute in attempt to determine what
14:22:37 9 I think is an appropriate sentence under Title 18,
14:22:40 10 Section 3553.

14:22:42 11 In addition to the actions that are depicted on the
14:22:50 12 videos that this Court observed at the trial, I find based on
14:22:56 13 the evidence from the trial that there were well over 2500
14:23:01 14 ongoing cases around the country with regard to the series
14:23:11 15 known as the "cbaby" series and over 700 ongoing cases on the
14:23:17 16 so-called "Tent" series.

14:23:21 17 Those cases did not start in a vacuum. And this is
14:23:26 18 why I said earlier it was my belief from the evidence at the
14:23:30 19 trial and it was my belief today that at least at some point
14:23:35 20 Mr. Diehl uploaded on at least one occasion those two series
14:23:43 21 that depict the Jane Does 1, 2, and 3, who are the victims
14:23:48 22 of -- in the indictment. And I do not mean to allude that I
14:23:55 23 think that he uploaded them as many times as the ongoing cases
14:24:00 24 indicate, but that he uploaded them enough times to where they
14:24:03 25 got into circulation where they have now developed a life of

14:24:08 1 their own and are continuing to be circulated. And I do find
14:24:12 2 that there is no way to pull those videos back.

14:24:17 3 I have often remarked in sentencing hearings where
14:24:24 4 the offense was merely the possession of pornographic materials
14:24:29 5 how serious that I think that crime is, because every depiction
14:24:38 6 of child pornography starts with an abused child. And without
14:24:44 7 a market for those materials, there would not be the abuse to
14:24:49 8 children to continue to feed that market.

14:24:51 9 Here we have gone beyond that in that Mr. Diehl,
14:24:59 10 however he wishes to discuss it, whether he was in pain from
14:25:03 11 his motorcycle collision, whether he was involved in a bad
14:25:08 12 lifestyle at that time, stepped way over the line in filming
14:25:17 13 these things himself.

14:25:19 14 Therefore, the strongest factor that I look at in
14:25:23 15 determining the appropriate sentence in this case is the
14:25:26 16 seriousness of this crime and what it has done to the people
14:25:31 17 that were victims and what it will continue to do to the people
14:25:35 18 who are victims and what it has done to their family.

14:25:39 19 I must determine a sentence that will promote respect
14:25:43 20 for the law. Now, the government has challenged the Court to
14:25:48 21 send a message, and the defendant has said there's nothing in
14:25:54 22 section 3553 that says "send a message," while "promoting
14:25:59 23 respect for the law" is close to it, if not there. I have
14:26:04 24 never been one who feels like the Court should grandstand to
14:26:08 25 send a message, but in this case the sentence needs to be

14:26:12 1 sufficient that will promote respect for the law among others
14:26:16 2 who might be considering this and, further, to provide just
14:26:22 3 punishment for this particular offense and to promote respect
14:26:25 4 for the law by this defendant.

14:26:27 5 I must consider a sentence that would afford adequate
14:26:31 6 deterrence to criminal conduct. That would be of this
14:26:35 7 defendant and others and as closely related to an appropriate
14:26:40 8 sentence that would create or promote respect for the law.

14:26:45 9 I find that this defendant needs correctional
14:26:50 10 treatment to the extent that he needs sex offender therapy,
14:26:58 11 which can be provided by the Bureau of Prisons. But I will say
14:27:02 12 under either the defense's suggestion of a reasonable sentence
14:27:09 13 of 120 years or the government's suggestion of a reasonable
14:27:14 14 sentence of -- I mean, 120 months and the government's
14:27:18 15 suggestion of a reasonable sentence of 620 months, each of
14:27:24 16 those would be sufficient to allow him the types of treatment
14:27:27 17 he needs.

14:27:28 18 I have mentioned the kinds of sentences that are
14:27:32 19 available to me and which I will consider, and I am also urged
14:27:39 20 in these sentencing memoranda to avoid unwarranted sentencing
14:27:46 21 disparities among defendants with similar records that have
14:27:50 22 been found guilty of similar conduct.

14:27:55 23 In this Court there has not been a large amount of
14:27:59 24 individual cases involving this type of crime, although they
14:28:04 25 are getting more numerous, which is disturbing to this Court.

14:28:09 1 But both parties have given this Court, as I mentioned earlier,
14:28:12 2 a good overview of the cases that are out there which, as I
14:28:18 3 said, indicates sentences from below 120 months to 75 years or
14:28:26 4 so.

14:28:27 5 I observe in determining how to place what is before
14:28:33 6 me in context with the article -- I mean, the Title 18, Section
14:28:43 7 3553 factors everything that has been presented to me. And I
14:28:58 8 recognize and will state on the record that, even though the
14:29:03 9 evidence is these particular crimes were committed some years
14:29:09 10 ago and there is no evidence of other crimes since then, that
14:29:15 11 it is possible to commit a crime that is so extreme and so
14:29:24 12 horrific and so heinous that punishment must be meted out to
14:29:34 13 fit the crime regardless of how a defendant has lived his life
14:29:41 14 since then. Otherwise, all of theories of sentencing would
14:29:47 15 collapse, because if you just evade detection and prosecution
14:29:51 16 long enough, then we hear that argued in court on why a light
14:29:57 17 sentence should be dealt out by the Court.

14:30:08 18 At the end of the day, I am faced with having to
14:30:10 19 assess a sentence that is sufficient but not greater than
14:30:15 20 necessary to satisfy each of those factors that I have
14:30:22 21 considered. In addition, I have considered the other factors
14:30:27 22 also. I render the sentence that will follow not in the way of
14:30:37 23 vengeance or an example, as the defense is concerned about.
14:30:44 24 Nor do I render it based on the challenge of the government
14:30:50 25 that the Court should have the courage to give a sentence -- a

14:30:57 1 strong sentence.

14:30:58 2 I render the following sentence because I find that
14:31:02 3 it is appropriate under Title 18 of the United States Code,
14:31:06 4 Section 3553 based on all of the evidence before me and for
14:31:12 5 that reason alone. I find that the following is a reasonable
14:31:17 6 sentence to impose in this case.

14:31:20 7 Therefore, pursuant to the Sentencing Reform Act of
14:31:22 8 1984, it is the judgment of this Court that you, David Andrew
14:31:27 9 Diehl, are hereby committed to the custody of the Bureau of
14:31:30 10 Prisons to be imprisoned for a total term of 600 months.

14:31:34 11 This sentence consists of 200 months on counts one,
14:31:38 12 three, and six, all to be served consecutively to one another,
14:31:45 13 and 200 months on counts two, four, five, seven, eight, nine,
14:31:49 14 and ten to be served concurrently with one another and
14:31:54 15 concurrently with counts one, three, and six, again, for a
14:31:58 16 total of 600 months.

14:32:01 17 While in prison, the defendant shall participate in
14:32:05 18 the sex offender management program offered by the Bureau of
14:32:09 19 Prisons. Upon release from imprisonment, you shall be placed
14:32:13 20 on supervised release for a term of five years on counts one
14:32:18 21 through ten to run concurrently.

14:32:21 22 Within 72 hours of release from the custody of the
14:32:23 23 Bureau of Prisons, you shall report in person to the probation
14:32:26 24 office in the district which you are released. While on
14:32:30 25 supervised release, you shall not commit another federal,

14:32:33 1 state, or local crime, and you shall comply with the mandatory
14:32:36 2 and standard conditions adopted by this Court on May the
14:32:40 3 27th, 2004 which include in part:

14:32:43 4 You shall register with the state sex offender
14:32:47 5 registration agency in the state where you reside, work, or are
14:32:52 6 a student, all as directed by your probation officer.

14:32:56 7 You shall comply with following special conditions:

14:33:00 8 You shall have no direct or indirect contact with any
14:33:03 9 victims named within the presentence report, to include Jane
14:33:06 10 Doe Number 1, Jane Doe Number 2, and Jane Doe Number 3 without
14:33:11 11 the prior written consent of your probation officer;

14:33:14 12 You shall attend and participate in the sex offender
14:33:17 13 treatment program operated by a licensed sex offender treatment
14:33:22 14 provider and any other sex offender treatment program approved
14:33:26 15 by your probation officer;

14:33:27 16 You shall abide by all program rules, requirements,
14:33:30 17 and conditions of the Sex Offender Registration Program,
14:33:33 18 including submission to polygraph examinations, to determine if
14:33:39 19 you are in compliance with the conditions of your release;

14:33:41 20 You may required to the cost -- pardon me. You may
14:33:45 21 be required to contribute to the cost of these services
14:33:48 22 rendered -- that's called a co-payment -- in an amount to be
14:33:51 23 determined by your probation officer based on your ability to
14:33:54 24 pay;

14:33:54 25 You shall follow all other lifestyle restrictions or

14:34:02 1 treatment requirements imposed by any therapist under his
14:34:04 2 treatment;

14:34:05 3 You are to continue those restrictions as they
14:34:07 4 pertain to avoid risk situations throughout the course of your
14:34:11 5 supervision. This includes not residing or going to places
14:34:15 6 where a minor or minors are known to frequent without prior
14:34:19 7 approval of your probation officer;

14:34:21 8 You shall not associate with any child or children
14:34:23 9 under the age of 18, except in the presence or supervision of
14:34:27 10 an adult specifically designated in writing by your probation
14:34:30 11 officer;

14:34:32 12 Your probation officer will notify the designated
14:34:35 13 adult of the risk occasioned by your criminal record or
14:34:38 14 personal history or characteristic;

14:34:40 15 You shall permit the probation officer to make such
14:34:43 16 notification;

14:34:45 17 You shall reside in a residence approved in advance
14:34:48 18 by your probation officer. Any changes in the residence must
14:34:52 19 be preapproved by your probation officer;

14:34:54 20 You shall not reside within 1,000 feet of the real
14:34:58 21 property comprised of a public or private elementary,
14:35:02 22 vocational, or secondary school, or public or private college
14:35:06 23 or junior college, university or playground or housing
14:35:09 24 authority owned by a public housing authority or within
14:35:12 25 100 feet of a public or private youth center, public swimming

14:35:17 1 pool or video arcade facility without approval of your
14:35:21 2 probation officer;

14:35:21 3 You shall refrain from purchasing, possessing, or
14:35:27 4 using any sexually stimulating or sexually oriented materials,
14:35:29 5 included but not limited to written, audio, and visual
14:35:33 6 depictions such as pornographic books, magazines, photographs,
14:35:37 7 films, videos, DVDs, computer programs, or any other media with
14:35:43 8 portrayal of the same;

14:35:44 9 You shall not use any computer at any location,
14:35:47 10 whether or not your place of employment, residence, or
14:35:50 11 elsewhere, without the prior written permission of your
14:35:54 12 probation officer;

14:35:54 13 You shall not possess or use a phone or any other
14:35:57 14 electronic device that allow access to the Internet without the
14:36:01 15 prior written permission of your probation officer;

14:36:03 16 You will not own or possess any type of camera,
14:36:07 17 photographic device, or other electronic equipment, including
14:36:12 18 video recording equipment, without the approval of your
14:36:16 19 probation officer;

14:36:17 20 You shall abstain from the use of alcohol and all
14:36:19 21 other intoxicants during your term of supervision;

14:36:25 22 You shall submit your person and any property, house,
14:36:28 23 residence, vehicle, papers, computer, and other electronic
14:36:32 24 communication or data storage devices or media and effects to a
14:36:37 25 search at any time with or without a warrant by any law

14:36:41 1 enforcement officer or probation officer with reasonable
14:36:44 2 suspicion concerning a violation of your condition of
14:36:48 3 supervised release or unlawful conduct by you or any other
14:36:53 4 person and by any probation officer in the lawful discharge of
14:36:57 5 that officer's supervisory duties.

14:37:00 6 It is further ordered that you shall pay to the
14:37:03 7 United States a fine in the amount of \$1,000. The Court will
14:37:08 8 waive the interest on that.

14:37:10 9 It is further ordered that you shall pay to the
14:37:14 10 United States a special mandatory assessment of \$100 per count
14:37:18 11 for a total of \$1,000, which shall be due immediately.

14:37:22 12 It is further ordered that you shall forfeit all
14:37:26 13 right, title, and interest in the following items: One
14:37:30 14 custom-built black computer contained a Seagate Barracuda 7200,
14:37:35 15 250 GB hard drive, serial number 6RY5KCF8; one custom-built
14:37:46 16 black computer containing a Maxtor DiamondMax 21, 500 GB hard
14:37:52 17 drive, serial number 9QG2Y6DO; and any media storage devices or
14:38:02 18 other computer accessories that have been seized.

14:38:05 19 Since you have been in custody since April the 6th,
14:38:09 20 2010, voluntary surrender is not an issue.

14:38:13 21 Mr. Diehl, at this time I am passing to the Clerk of
14:38:16 22 this Court the presentence investigation report prepared by the
14:38:20 23 Probation Department in this case and to which we have referred
14:38:24 24 during this proceeding. I am ordering that that report be
14:38:27 25 sealed. This means that no one may come to the District

14:38:30 1 Clerk's Office and read about you or any member of your family
14:38:33 2 or any of the facts and circumstances surrounding the offenses
14:38:37 3 for which you were previously convicted and have been sentenced
14:38:41 4 today.

14:38:42 5 However, I wish to advise you that if there is an
14:38:45 6 appeal from the sentence that I have just imposed, then both
14:38:48 7 you and the government may use your copies of the presentence
14:38:51 8 investigation report for purposes of appeal. And in that
14:38:54 9 event, the presentence investigation report will be part of the
14:38:58 10 record on appeal. Do you understand that?

14:39:00 11 THE DEFENDANT: Yes, Your Honor.

14:39:01 12 THE COURT: You may appeal the sentence that I have
14:39:03 13 just imposed. In a moment I'll be handing to you and your
14:39:07 14 attorney letters that explain that to you. However, I wish to
14:39:09 15 tell you at this time that if for any reason at all you desire
14:39:13 16 to appeal the sentence that I have just imposed or if for any
14:39:16 17 reason at all you feel you have a right to appeal that
14:39:19 18 sentence, you may only do so if you first file with the Clerk
14:39:23 19 of this Court within 14 days -- that's 14 days from today -- a
14:39:27 20 written document called a Notice of Appeal. That's a written
14:39:30 21 Notice of Appeal.

14:39:31 22 If you do not file such a written Notice of Appeal
14:39:35 23 with the Clerk of this Court within 14 days of today, you can
14:39:39 24 never appeal the sentence that I have just imposed, and you
14:39:42 25 will waive any and all rights you have to appeal that

14:39:44 1 sentence. Do you understand that?

14:39:46 2 THE DEFENDANT: Yes, Your Honor.

14:39:47 3 THE COURT: At this time I am passing to you and your
14:39:49 4 attorney letters that explain that to you.

14:39:52 5 Is there anything further that the government wished
14:39:56 6 to say or present in this case at this time?

14:39:57 7 MR. DEVLIN: No, Your Honor.

14:39:58 8 THE COURT: Is there anything further that the
14:40:00 9 defendant wishes to say or present in this case at this time?

14:40:03 10 MR. MORRIS: Yes, Your Honor. For the record, we
14:40:05 11 object to the sentence that the Court has imposed as being
14:40:09 12 substantively unreasonable and also procedurally unreasonable.

14:40:13 13 THE COURT: The Court notes your objection. Your
14:40:15 14 record is protected. Anything further from the government,
14:40:17 15 Mr. Devlin?

14:40:17 16 MR. DEVLIN: No, Your Honor.

14:40:18 17 THE COURT: Then at this time, you are excused and
14:40:21 18 the Court is in recess.

14:40:23 19 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
8 those prescribed by the Court and Judicial Conference of the
9 United States

10 WITNESS MY OFFICIAL HAND this the 10th day of
11 January 2012.

12

13 /S/ Arlinda Rodriguez
14 Arlinda Rodriguez, Texas CSR 7753
15 Expiration Date: 12/31/2012
16 Official Court Reporter
17 United States District Court
18 Austin Division
19 200 West 8th Street, 2nd Floor
20 Austin, Texas 78701
21 (512) 916-5143

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